5 Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's dismissal of a lawsuit, under the doctrine of international comity and based on the preclusive effect of a foreign judgment, is reviewable *de novo* or only for abuse of discretion.

2. Whether the doctrine of international comity may be invoked, based on a prior order of a foreign bankruptcy court approving a plan of reorganization for a foreign debtor, to bar a lawsuit in U.S. courts, where the precluded claims are asserted against parties *other* than the foreign debtor and could not have been brought in the foreign proceeding.

RULE 29.6 STATEMENT

Daewoo Motor America, Inc., has since changed its name to StarPoint USA, Inc. Ninety-five percent of its stock is held by Credit Managers Association in trust for, and for the benefit of, the thousands of holders of unsecured claims in petitioner's Chapter 11 proceeding. Credit Managers Association does business as CMA Business Credit Services, a mutual benefit association incorporated in California. Credit Managers Association is a privately held corporation, and is not owned by any publicly held corporation.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 459 F.3d 1249. The district court's order (*id.* at 48a-71a) is reported at 315 B.R. 148.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2006, and rehearing was denied on October 3, 2006 (App., *infra*, 74a-75a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case raises two recurring issues concerning the doctrine of international comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). The doctrine of comity arises in a variety of settings, including where litigation in a foreign forum (a) is merely a possibility, (b) is actually pending, or (c) has ended in judgment (in which case the American court is being asked either to enforce the judgment or to give it res judicata effect). See *Diorinou* v. *Mezitis*, 237 F.3d 133, 139-40 (2d Cir. 2001). This case involves the last situation. Specifically, it raises the question whether comity requires that an order approving a plan of reorganization for a foreign debtor in a foreign bankruptcy proceeding be given res judicata effect to bar the damages and other claims of a creditor against parties *other* than the foreign debtor, where such claims were not adjudicated – and could not even have been *raised* – in the foreign bankruptcy proceeding.

In upholding this expansive use of the comity doctrine, a panel of the Eleventh Circuit, with one judge disagreeing on this ground, has extended the principle of comity far beyond its traditional precincts. In so doing, the panel majority created a conflict with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987), which held that non-debtors (such as respondents) are *not* entitled, under comity principles, to use a foreign bankruptcy order "as a shield" against the claims of third parties (such as petitioner). Beyond that, the lower court's adoption of a deferential abuse-of-discretion standard of appellate review conflicts with the *de novo* standard adopted and applied by the Second Circuit. To resolve these conflicts, and clarify the recurring issues presented concerning the meaning and proper administration of the comity doctrine, further review is warranted.

A. Factual Background

This case arises out of the substantial destruction of the business of petitioner Daewoo Motor America ("Daewoo America") caused by the fraudulent representations and other tortious conduct of the respondents. Until 2002, Daewoo America, a U.S. corporation, was the exclusive United States distributor for certain vehicles, parts, accessories, and equipment manufactured by Daewoo Motor Co., Ltd. ("DWMC"), which at that time was Daewoo America's Korean parent company. Doc 144, Ex 7 – Pg 1-4. Daewoo America and DWMC were parties to a ten-year distributorship agreement executed in 1999 that was terminable only in limited circumstances (the "Distribution Agreement"). *Id.* at 2. From 1997 to 2001, Daewoo America grew from a fledgling company promoting and distributing these products into America's fastest-growing car company with over 500 franchised dealers. Doc 64 – Pg 5-7.

DWMC encountered financial difficulties and, on November 10, 2000, filed for court receivership and

reorganization under the Corporate Recovery Act of Korea in the Inchon District Court in South Korea ("Korean Reorganization Court"). Doc 64 – Pg 7; App., *infra*, 51a. Following his appointment, DWMC's receiver adopted the Distribution Agreement under Korean law by continuing to perform (selling more than $400 million worth of vehicles and parts to petitioner) and by receiving petitioner's performance. Doc 142 – Pg 28; Doc 144 – Pg 3. During DWMC's reorganization, the receiver also began acquisition negotiations with respondent General Motors Corp. ("GM"). Doc 64 – Pg 7. Throughout the negotiation process, GM repeatedly assured petitioner that GM's acquisition of DWMC's assets would not alter petitioner's exclusive distributorship. *Id.* at 9-11. Based on these representations, petitioner continued to invest in and expand its business, purchased additional vehicles from DWMC, entered into new dealer agreements, gave assurances to its dealers, and even offered the dealers enhanced sales incentives and warranty coverage. *Id.* at 10-11; Doc 144 – Pg 3.

But GM's representations proved to be false. On April 30, 2002, GM entered into an agreement – known as the Master Transaction Agreement ("MTA") – to acquire all of the assets, including the manufacturing facilities and brand name rights, of DWMC and to transfer those assets to a newly created entity, respondent GM Daewoo Auto & Technology Co. ("GMDAT"). Doc 64 – Pg 12. Pursuant to the MTA, GM and its affiliates, including respondent Suzuki Motor Corp. ("Suzuki"), held a two-thirds ownership stake in GMDAT. *Ibid.* Contrary to GM's repeated assurances, the MTA excluded petitioner from the acquisition, effectively cutting off petitioner's vehicle supply – and giving GM's designee the right to distribute identical vehicle models in petitioner's exclusive territory. *Id.* at 13-15.

In February 2003, GM and its affiliates, including Suzuki's U.S. subsidiary, respondent American Suzuki Motor Corp.

("American Suzuki"), announced their intention to begin selling identical vehicle models ("rebadged" as Suzukis and Chevrolets) in the United States. *Id.* at 14-15.

B. The Trial Court Proceedings

After the MTA was executed, the DWMC receiver threatened to terminate the Distribution Agreement. Faced with this threat, petitioner filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code on May 16, 2002, in federal bankruptcy court in California. Doc 64 – Pg 13. That filing in turn triggered an automatic stay protecting petitioner's property rights under 11 U.S.C. § 362. At the time of petitioner's Chapter 11 filing, the property rights protected by the automatic stay included petitioner's rights under the Distribution Agreement.[1] Petitioner has thousands of U.S. creditors who have filed over $840 million in claims in the U.S. bankruptcy proceeding.[2]

Subsequent to petitioner's Chapter 11 filing, the Korean Reorganization Court on September 30, 2002 approved a plan of reorganization for DWMC and approved GM's purchase

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[1] See *Krystal Cadillac Oldsmobile GMC Truck, Inc.* v. *GM Corp.*, 142 F.3d 631, 637-38 (3d Cir. 1998) (order that effectively terminated debtor's franchise agreement violated Section 362(a)(3) and was not binding upon the bankruptcy court); *In re Computer Communications, Inc.*, 824 F.2d 725, 730-31 (9th Cir. 1987) (termination of contract violated stay). The automatic stay has extraterritorial effect and applies to foreign proceedings. See *In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998). Actions taken in violation of the automatic stay are void. *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000) (en banc).

[2] Pursuant to petitioner's reorganization plan, any recovery from this lawsuit will be transferred to Creditors Management Association, for distribution to holders of unsecured claims in petitioner's Chapter 11 proceeding. See page ii, *supra*.

agreement embodied in the MTA. App., *infra*, 54a; Doc 123, Ex 5-A – Pg 1-9.

On July 22, 2003, petitioner filed this action against respondents in the bankruptcy court in California. Doc 1 – Pg 1-24. In its amended complaint, Daewoo America advanced (1) claims against GM for fraud, tortious interference with contract, tortious interference with prospective economic advantage, and aiding and abetting breach of fiduciary duty; (2) a claim against GMDAT for successor liability; and (3) claims against all respondents for violating various California, Florida, and Massachusetts statutes, for unauthorized post-Chapter 11 transfers, and for violating the automatic stay. Doc 64 – Pg 1-32.

In March 2004, the federal bankruptcy court dismissed certain of petitioner's claims, declined to dismiss certain others, and set forth a briefing schedule on respondents' comity defense. Doc 112 – Pg 2-3. Before the next scheduled hearing, however, the Judicial Panel on Multidistrict Litigation transferred the action to the U.S. District Court for the Middle District of Florida. Doc 107 – Pg 3-4.

In October 2004, the district court dismissed petitioner's amended complaint with prejudice based on the principle of international comity. App., *infra*, 48a-71a. It concluded that the Korean Reorganization Court's order approving the asset transfer and DWMC's reorganization plan precluded petitioner from pursuing the present litigation in the United States. *Id.* at 63a, 69a-71a. The district court reached that conclusion even though the Korean court's order made no mention of any of petitioner's claims against respondents or of petitioner's contractual rights under its agreement with DWMC. Denying a motion for clarification and reconsideration, the district court thereafter directed entry of judgment for respondents on all of petitioner's claims. App., *infra*, 72a-73a.

C. The Court of Appeals' Decision

1. A panel of the Eleventh Circuit affirmed. App., *infra*, 1a-19a. The panel majority acknowledged that under the governing treaty between the United States and Korea, "a Korean judgment is elevated to the status of a sister state judgment." *Id.* at 15a. And it recognized that a "sister state" (or federal) judgment receives only such preclusive effect as the principles of res judicata allow. *Id.* at 16a-18a. Notwithstanding the close tie between the comity issue in this case and res judicata analysis, the panel majority declined to apply to a comity ruling the *de novo* standard of appellate review that is applied to res judicata rulings by the Seventh and Ninth Circuits (as well as by the Eleventh Circuit itself). See, *e.g.*, *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir. 2001); *Waid* v. *Merrill Area Public Schools*, 91 F.2d 857, 860 (7th Cir. 1996); *Clark* v. *Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). Instead, the majority declared without elaboration that "[t]he principle of international comity applied in this case is *an abstention doctrine*." App., *infra*, 10a (emphasis added). Because abstention rulings receive only abuse-of-discretion review in the Eleventh Circuit, the panel held that the district court's dismissal of petitioner's claims was likewise reviewable only for abuse of discretion. *Id.* at 10a (citing *Boyles* v. *Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000)).

Applying that deferential standard of review, the majority next concluded that the trial court had not abused its discretion in holding that the Korean Reorganization Court's order barred all of petitioner's claims against respondents. App., *infra*, 13a-19a. In particular, the majority squarely rejected petitioner's argument that "the scope of the comity granted to the order of the Korean court should not extend to [petitioner's] claims against the defendants because those claims *were not and could*

not have been raised in the Korean bankruptcy proceeding." *Id.* at 16a (emphasis added).[3] The court of appeals explained:

> The claims of Daewoo America arise out of the same nucleus of operative facts considered by the Korean court. The claims of Daewoo America are based on the Modified Reorganization Plan and MTA, which were approved by the Korean court. The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court. The complaint

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[3] As petitioner demonstrated with evidence of foreign law in the form of expert affidavits (see Pet. C.A. Br. 9-11), there are two independent reasons why petitioner's claims against respondents could not have been raised and adjudicated in the Korean bankruptcy proceeding. First, those claims qualify as general civil claims under Korean law and, as such, they fall outside of the limited jurisdiction of the Korean Reorganization Court. See Supplemental Cho Decl. 12-13 (¶ 16). Second, even petitioner's claims *against the debtor, DWMC*, qualify as "common benefit" claims under Korean bankruptcy law. Korean law distinguishes between two very different types of claims against a company under reorganization: (1) reorganization claims; and (2) "common benefit" claims. Reorganization claims primarily consist of monetary claims against the debtor arising *prior to* the commencement of reorganization proceedings (which, as noted above, occurred on November 10, 2000). Common benefit claims, in contrast, generally arise *after* commencement of reorganization proceedings. Petitioner's claims *against DWMC* for breach of the Distribution Agreement (an agreement which the DWMC receiver adopted) arose *after* the reorganization proceedings began and are thus common benefit claims. Significantly, in Korea holders of common benefit claims do *not* participate in reorganization proceedings; instead, they must pursue their claims *outside* of the reorganization plan in ordinary (*i.e.*, non-bankruptcy) courts. Thus, although a reorganization plan under Korean law binds reorganization creditors and may alter their rights as holders of reorganization claims, it does not bind holders of common benefit claims and cannot alter their rights as such.

> of Daewoo America regarding the effect of the MTA should have been raised before the Korean court. Daewoo America cannot now collaterally attack that order by bringing claims against the recipients of the property transferred based on the approval by the Korean court.

App., *infra*, 16a. Because the panel majority assumed that all of petitioner's claims could have been raised in the Korean proceeding, it emphasized petitioner's notice of those proceedings and faulted petitioner for not raising its claims there. *Id.* at 6a-7a, 14a-15a. In concluding that *all* of petitioner's claims against the respondents were precluded by the Korean bankruptcy court's order, the panel majority also relied on the fact that some of those claims sought injunctive relief (and one claim requested that "the transfer be set aside"). *Id.* at 16a.

Finally, the panel majority sought to distinguish several cases that had refused to apply the doctrine of res judicata to give an order confirming a plan of reorganization in a U.S. bankruptcy proceeding claim-preclusive effect with regard to legal claims brought by one creditor in the reorganization proceeding against other creditors or non-debtor parties. The Eleventh Circuit's prior decision in *Piper Aircraft* was distinguishable, the panel majority explained, because there the "'facts underpinning'" the creditor's claims – all of which arose out of a failed agreement to reorganize the debtor – "'were not at issue in the confirmation proceeding.'" App., *infra*, 17a (quoting *Piper Aircraft*, 244 F.3d at 1297). In contrast, the court explained, "the facts underpinning [Daewoo America's] complaint * * * *were* at issue in the Korean proceeding because those facts *relate to* the approval of the Modified Reorganization Plan and the MTA." *Id.* at 17a (emphasis added). The panel majority also distinguished *La Preferida, Inc.* v. *Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990), on the ground that it involved a prior consent judgment

(which is not entitled to collateral estoppel effect). App., *infra*, 17a.

2. Judge Tjoflat wrote a lengthy opinion concurring in the judgment, in which he disagreed with the majority's decision to uphold the dismissal of all of petitioner's claims on the basis of international comity. App., *infra*, 19a-47a. In Judge Tjoflat's view, "it is patently clear that the [panel majority], like the district court, rushed into * * * dismissing Daewoo America's Amended Complaint in its entirety when, in fact, the international comity doctrine has only limited application." *Id.* at 47a.

As Judge Tjoflat explained, "most of Daewoo America's claims solely concern the [respondents'] dealings with Daewoo America, separate and distinct from the transfer of [DWMC's] manufacturing assets to GM and its partners." App., *infra*, 19a. "For the vast majority of Daewoo America's claims, the proceedings before the Korean bankruptcy court serve as little more than a factual backdrop." *Ibid.* Judge Tjoflat specifically disagreed with the majority's assumption that "the validity of the MTA, the Korean bankruptcy court's orders, or the Korean bankruptcy proceedings" was in any way relevant to the questions underlying petitioner's claim, which were "whether GM's promise to make Daewoo America its United States distributor was intentionally untruthful" and "whether the [respondents] eliminated Daewoo America's vehicle supply with tortious or anticompetitive intent." *Id.* at 36a.

Judge Tjoflat also disagreed with – and criticized as "misleading" – the majority's reliance on petitioner's request for injunctive relief on some of its claims, noting that petitioner was also seeking "*damages* on *thirteen*" of its fourteen claims. App., *infra*, 27a n.8 (emphasis in original). "Awarding Daewoo America damages pursuant to its claims," Judge Tjoflat explained, "would do nothing to disturb GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." *Ibid.*

Moreover, even as to Daewoo America's successor liability claim against GMDAT, Judge Tjoflat observed, it cannot be said that Daewoo America was "trying to upset the bankruptcy order." App., *infra*, 33a n.15. "Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale," that claim "is simply seeking to enforce the bankruptcy court's order." *Id.* at 33a; see also *id.* at 33a n.15 (noting that the successor liability claim presupposed that "GMDAT has an obligation to Daewoo America that survives bankruptcy and is attempting to enforce it"); *id.* at 36a (noting that this claim "is entirely dependent on the validity of the Korean bankruptcy proceedings").

In sum, Judge Tjoflat noted, "this dispute simply is not part of the Korean bankruptcy, and granting international comity to the [Korean Reorganization Court]'s orders does little to resolve it." *Id.* at 20a. Because Judge Tjoflat ultimately concluded that petitioner's remaining claims were insufficient as a matter of law, however, he concurred in the court's disposition of the appeal. *Id.* at 47a.[4]

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[4] Although Judge Tjoflat ultimately concurred in the judgment, there is good reason to believe that the result would be different if this case were remanded to the Eleventh Circuit following a decision by this Court in petitioner's favor on the issues presented. First, the panel majority declined to adopt Judge Tjoflat's alternative rationale, and there is no reason to believe that it would adopt all of his conclusions if this Court disapproves the majority's comity ruling. Second, if and when there is a remand to the panel, petitioner will have an opportunity to explain that certain of Judge Tjoflat's alternative grounds are unsustainable. For example, Judge Tjoflat concluded that petitioner's fraud claim against GM should be dismissed because, in his view, petitioner cannot prove that GM's misrepresentations caused it any harm. App., *infra*, 45a-46a. But first, GM never made that argument below, petitioner never had a chance to address it, and the district court did not consider it; that rationale accordingly is unavailable as a basis for affirming dismissal of the complaint. What

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to make sure that the doctrine of international comity has a uniform and sensible meaning. In "today's highly interdependent commercial world," *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-65 (2004), featuring the globalization of business and a corresponding rise in transnational litigation in American courts, the comity doctrine has assumed great importance. Further review would permit the Court to resolve conflicts in the circuits over the scope of the comity doctrine and over the proper division of authority between trial and appellate courts in administering this important principle, which implicates the Nation's relations with other countries.

This case is especially deserving of the Court's attention because it involves the application of the comity doctrine to consecutive foreign and domestic bankruptcy proceedings. As the decision below amply demonstrates, this setting presents special difficulties for generalist federal judges (who must grapple not only with unfamiliar bankruptcy-law concepts but also with unfamiliar issues of foreign law and unfamiliar foreign proceedings). Given "the exponential growth of multinational or transnational corporate enterprise," Eric W. Orts, *The Future of Enterprise Organization*, 96 MICH. L. REV. 1947, 1962-63 (1998), and the globalization of capital markets, it is hardly

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is more, this conclusion reflects a truncated understanding of the actual fraud claim, the entirety of which has never been reviewed. GM's misrepresentations led petitioner to continue investing in and expanding its business, see page 3, *supra*, and GM's exclusion of petitioner from the MTA saddled it with inventory which had lost significant value and forced it to buy back the vehicles it had sold to dealers. Doc 64 – Pg 13. In short, given the opportunity to return to the Eleventh Circuit following a favorable ruling, petitioner has every hope of persuading the court to reverse the dismissal of the action.

surprising that American courts are facing issues like those presented in this case with increasing frequency.

Congress has recognized this phenomenon and taken steps to provide greater certainty, predictability and uniformity to the businesses, investors, creditors, and consumers that might find themselves willing or unwilling participants in foreign insolvency regimes. Toward that end, Congress recently added an additional chapter – Chapter 15, 11 U.S.C. §§ 1501-1532 – to the Bankruptcy Code. See, *e.g.*, 11 U.S.C. § 1501(a) (explaining ways that Chapter 15 is intended to "provide effective mechanisms for dealing with cases of cross-border insolvency"). Chapter 15, however, addresses only *concurrent* U.S. and foreign insolvency proceedings for the *same* debtor. It does not address how domestic subsidiaries and their creditors are affected by orders entered in foreign insolvency cases involving their parent entities. That question is ordinarily answered through resort to the judge-made doctrine of international comity. This Court can provide greater clarity here by addressing the effect of a foreign parent's insolvency proceeding on a U.S. subsidiary's claims against parties *other than* the foreign parent. More generally, further review would allow the Court to provide much-needed clarification of how the comity doctrine should be applied to the important and recurring phenomenon of foreign bankruptcy proceedings.

In the decision below, a panel of the Eleventh Circuit has stretched the boundaries of international comity far beyond traditional limits, extending greater preclusive effect to a foreign judgment than is available to a domestic judgment under the principles of res judicata. In an unprecedented expansion of the comity doctrine, the panel ruled that an order of a foreign court approving a plan of reorganization for a foreign debtor barred not only claims against the foreign debtor but also claims against *parties other than the debtor* that *could not have been adjudicated* by the foreign bankruptcy court. Thus, the majority affirmed the dismissal of all of the claims brought by petitioner

Daewoo America against the four respondents, even though none was the debtor in the foreign insolvency proceeding to which the district court extended comity. And it reached that result even though, as Judge Tjoflat correctly pointed out, petitioner's damages claims were based in large measure on conduct of respondents extrinsic to the Korean bankruptcy proceeding – and success on those damages claims would in no way have called into question the Korean court's orders.

The panel majority's unwarranted expansion of the comity doctrine was accomplished in two separate steps. First, it applied the deferential abuse-of-discretion standard to the district court's blanket application of comity and dismissal of petitioner's claims, thereby elevating the status of a foreign judgment *above* that of a domestic judgment (the res judicata effect of which would have been reviewed *de novo* on appeal). In adopting this deferential standard of review, the panel went into conflict with the Second Circuit's well-reasoned decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2d Cir. 2001), which adopted and applied *de novo* review for comity rulings of the kind involved here. The panel majority's deference to the district court effectively shut the courthouse doors to a U.S. debtor and its thousands of creditors, who hold over $840 million in claims. Yet, the panel majority offered no reason – other than a mistaken analogy to abstention cases – for affording such deference to the district court's application of comity to a foreign judgment.

The panel majority further elevated the status of the foreign reorganization court's order by extending comity to preclude claims brought by a creditor in the foreign proceeding against *non-debtor* parties. The majority's holding squarely conflicts with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987), which held that non-debtors are *not* entitled to invoke comity principles "as a shield" against the claims of third parties. As the Third Circuit recognized, to hold otherwise would be to

disregard the fundamental reasons for affording deference to a foreign reorganization court's order approving a plan of reorganization – namely, to allow a foreign debtor's assets to be distributed to its creditors fairly and ratably and to protect the foreign debtor by ensuring that claims that were discharged in the foreign proceeding cannot be reasserted against the foreign debtor.

But the panel decision strays even further from traditional reasons for comity and ordinary principles of res judicata: It sustained the dismissal even of claims that *could not have been* adjudicated in the Korean bankruptcy proceeding. See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982) (claim preclusion does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts"). In sharp contrast, this Court – and other courts of appeals – have consistently refused to apply res judicata to bar claims that could not have been raised in a prior proceeding. See, *e.g.*, *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); *Brody* v. *Village of Port Chester*, 345 F.3d 103, 114 (2d Cir. 2003); *Waid* v. *Merrill Area Public Schools*, 91 F.2d 857, 866 (7th Cir. 1996); *Clark* v. *Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992); see also *In re Birting Fisheries, Inc.*, 300 B.R. 489 (B.A.P. 9th Cir. 2003). The panel's emphasis on petitioner's actual notice of the Korean bankruptcy proceeding is beside the point because the claims at issue here simply could not have been raised and adjudicated in the foreign bankruptcy proceeding. To resolve these conflicts, clarify the comity doctrine, and correct the Eleventh Circuit's manifest errors, further review is warranted.

I. This Court Should Resolve The Conflicts In The Lower Courts Over The Proper Standard Of Appellate Review

The panel majority's threshold determination was that the district court's dismissal of all of petitioner's claims based on comity was reviewable only for an abuse of discretion. App., *infra*, 10a. The only explanation offered by the majority for adopting that standard of review – and rejecting the *de novo* standard urged by petitioner – was its statement that "[t]he principle of international comity applied in this case is an abstention doctrine" (and abstention rulings are reviewed for abuse of discretion). *Ibid.* As we explain below, the Eleventh Circuit's holding directly conflicts with the Second Circuit's well-reasoned decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2d Cir. 2001), which applied *de novo* review and rejected the abuse-of-discretion standard in an identical setting. This Court should grant review of the first issue presented to resolve this direct conflict in the circuits, bring greater clarity to an issue that has spawned confusion in the lower courts, and correct the error below.

A. The leading case on standards of review relating to the doctrine of international comity is the Second Circuit's decision in *Diorinou*. See 2 VED NANDA & DAVID PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS ¶ 15:8 (2006) (in section dealing with the "standard of review" for comity determinations, summarizing the *Diorinou* framework). In *Diorinou*, Judge Newman conducted a detailed review of the relevant case law and explained that the proper standard of appellate review of a comity ruling depends on the nature of the district court decision under review. 237 F.3d at 138-40. He proceeded to identify "three different contexts" in which "United States courts have said that they are deferring to foreign proceedings or adjudications as a matter of 'comity.'" *Id.* at 139. *First*, "domestic court[s]" are sometimes asked to refrain from "proceed[ing] with litigation within [their] jurisdiction because

of the *pendency or availability* of litigation in a foreign forum." *Ibid.* (emphasis added) (citing cases). Because a district court declining to adjudicate a lawsuit in this circumstance based on comity is "invoking a doctrine akin to *forum non conveniens*," Judge Newman explained, and because *forum non conveniens* rulings are reviewed on appeal for abuse of discretion, "the same standard of review has been held to govern a similar abstention" based on comity "in favor of foreign proceedings" that are either pending or yet to be initiated. *Ibid.*

"[A] *second* context," Judge Newman explained, is when "a domestic court considers whether *to enforce a foreign judgment*." 237 F.3d at 139 (emphasis added) (reviewing cases). Here, in contrast to the first setting, the foreign proceeding has ended and a final judgment has been entered. As Judge Newman explained, "domestic courts have not clearly articulated the standard of appellate review of the decision whether to enforce the foreign judgment, but appear to be applying a *de novo* standard * * * just as they would on review of a judgment in an action to enforce a judgment of a court within the United States." *Ibid.*; accord *Kwongyuen Hangkee Co.* v. *Starr Fireworks, Inc.*, 634 N.W.2d 95, 96 (S.D. 2001) (application of international comity in action to enforce a foreign judgment "presents a question of law, which is reviewed de novo"). In addition to citing illustrative decisions of the courts of appeals, Judge Newman cited this Court's decision in *Hilton* v. *Guyot*, 159 U.S. 113 (1895), as an example of *de novo* review being applied to this type of comity-based ruling.

Finally, Judge Newman identified "a *third* context," illustrated by the facts of *Diorinou* itself, where "a domestic court considers whether to *accept the adjudication* of a foreign tribunal *on a cause of action or a particular issue*." 237 F.3d at 139 (emphasis added) (citing cases). Here too, the foreign proceeding is not merely pending or anticipated but has resulted in an adjudication, and the application of the comity doctrine is thus entirely "retrospective." In this third context, "as in the

enforcement of foreign judgments context," Judge Newman explained,

> appellate courts have not explicitly articulated the standard of review, but we believe the standard is *de novo* review, * * * just as it would be on review of a judgment of a domestic court based on *res judicata* or collateral estoppel.

Id. at 140 (citing *SEC* v. *Monarch Funding Corp.*, 192 F.2d 295, 303 (2d Cir. 1999) (applying *de novo* review to district court's ruling based on collateral estoppel)). The *Diorinou* panel then proceeded to review *de novo* the lower court's decision.

This case falls squarely into the third category identified by Judge Newman. Respondents successfully obtained the dismissal of all of petitioner's claims based on the res judicata effect of the Korean bankruptcy proceedings and orders. Those proceedings have been completed and reduced to a final judgment. It is therefore beyond dispute that, had this appeal been heard by the Second Circuit, the court of appeals would have applied a *de novo* standard of review. The Eleventh Circuit's adoption of an abuse-of-discretion standard of review directly conflicts with the holding of *Diorinou*.[5]

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[5] In a more recent case, the Second Circuit has made clear that even in the first context identified in *Diorinou*, when reviewing a lower court's "decision to abstain from exercising jurisdiction" based on comity because of a pending or ongoing foreign proceeding, it will apply a "more rigorous" form of abuse-of-discretion review that is of "little practical distinction" from *de novo* review. *Royal and Sun Alliance Ins. Co. of Canada* v. *Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006). The Second Circuit applies this "more rigorous" standard to the review of abstention rulings generally because abstention is "an exception to a court's normal duty to adjudicate a controversy properly before it." *Hachamovitch* v. *DeBuono*, 159 F.3d 687 (2d Cir. 1998) (internal quotations omitted). On the other hand,

Nor is this all. The Second Circuit in *Diorinou* took pains to preserve parity between (a) the way the doctrine of international comity is applied to *foreign* judgments and proceedings, and (b) the legal standards that govern *domestic* judgments or proceedings. The reason is straightforward. The whole point of the comity doctrine is to accord *equivalent* – not preferential – treatment to foreign judgments and proceedings in comparison to the treatment accorded to domestic judgments and adjudications. As the panel majority acknowledged in this case, that bedrock principle is embodied in the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, which provides that "a Korean judgment is elevated to the status of a sister state judgment." App., *infra*, 15a (citing 8 U.S.T. 2217); see also *Vagenas* v. *Continental Gin Co.*, 988 F.2d 104, 106 (11th Cir. 1993). By adopting a more deferential standard of review than it would apply to a res judicata ruling concerning a prior *domestic* judgment, see *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006) (*de novo* review); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir. 2001) (same); see also *Int'l Transactions, Ltd.* v. *Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589, 593 (5th Cir. 2003), the Eleventh Circuit has destroyed the parity that is at the heart of the comity doctrine.

Although this square conflict between two circuits that are important fora for transnational litigation is reason enough to grant review of the first issue presented, it is worth noting that there is considerable confusion in the lower courts over the

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the Second Circuit also recognizes "foreign bankruptcy proceedings" as a "category of foreign litigation" in which abstention in favor of parallel proceedings is usually necessary if maintenance of the plaintiff's claims would threaten the "equitable and orderly disposition of the debtor's property." *Royal and Sun Alliance Ins. Co.*, 466 F.3d at 93 (internal citations omitted). No such threat – or parallel proceedings – exists in this case.

proper standard of review. Some appellate courts have followed Judge Newman's lead in *Diorinou* by adopting a *de novo* standard of review in this setting. See, *e.g.*, *Velez* v. *Mitsak*, 89 S.W.3d 73, 79 (Tex. App. 2002) (reviewing the trial court's determination whether to give deference to an earlier Hague Convention petition *de novo*, citing *Diorinou*); *In the Interest of T.J.*, No. 12-03-00331-CV, 2005 Tex. App. LEXIS 1927, at *15 (March 14, 2005) (same) (citing *Velez*). In contrast, the Supreme Court of California has adopted the abuse-of-discretion standard for reviewing a lower court's decision whether to grant comity to a foreign judgment. See *In re Stephanie M.*, 867 P.2d 706, 716 (Cal. 1994).

The Fifth and Ninth Circuits, moreover, have endorsed approaches to the standard-of-review issue that differ from the approaches used in the Second and Eleventh Circuits. In *Overseas Inns S.A. P.A.* v. *United States*, 911 F.2d 1146 (5th Cir. 1990), the court of appeals suggested that appellate review of whether to grant comity to a foreign judgment *on a motion for summary judgment* is subject to the same *de novo* standard that applies *to other summary judgment rulings*. *Id.* at 1148 n.4. Although the Fifth Circuit also stated that it was "not necessary to decide the issue" in that case, its suggestion that the appropriate standard of review *turns on the procedural setting* of the lower court's ruling represents a manifestly different approach to the issue. Here, of course, petitioner's claims were dismissed by the district court. Like other circuits, the Eleventh Circuit "'ordinarily review[s] the grant of motions to dismiss or summary judgment *de novo*'" (App., *infra*, 10a (quoting *Parks* v. *City of Warner Robins, Georgia*, 43 F.3d 609, 612-13 (11th Cir. 1995)). Thus, if the panel had followed the Fifth Circuit's suggested approach in *Overseas Inn*, it would have applied a *de novo* standard of review in this case as well.

In a subsequent case, however, the Fifth Circuit, without citing *Overseas Inn*, stated that comity rulings are "reviewed for abuse of discretion." *International Transactions, Ltd.* v.

Embotelleradora Agral Regiomontana, S.A. de C.V., 347 F.3d 589, 593 (5th Cir. 2003). Thus, the state of the law in the Fifth Circuit is less than clear. The Fifth Circuit's decisions reflect the same confusion that is apparent when comparing the decisions in different circuits.

The Ninth Circuit has suggested that the standard of review may hinge not on the progress or timing of the foreign proceedings (as in *Diorinou*), but rather on the procedural posture of the ruling below as well as on the *legal basis* for the comity determination. In *Bird* v. *Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001), the court of appeals explained that "[b]ecause the decision to recognize a foreign judgment is discretionary, not mandatory, * * * some federal courts of appeals have concluded that a district court's decision to recognize a foreign judgment should be reviewed for abuse of discretion." *Id.* at 1140 (citing, *e.g.*, *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987)). But it went on to say that *de novo* review was appropriate because the decision to extend comity turned on whether the foreign judgment had been entered without adequate due process safeguards, and "we review de novo claims of due process violations." *Ibid.* *De novo* review was also "required," the Ninth Circuit explained, because it was "reviewing a district court's summary judgment" ruling. *Ibid.*

B. The standard of review applicable to a trial court's determination of whether to give effect to a foreign judgment based on international comity is a fundamental question that affects a growing number of cases as multinational companies increasingly dominate the global economy. The issue arises at the threshold of every appeal taken of a ruling in which the comity doctrine has been invoked as a basis for giving res judicata effect to a foreign judgment. Moreover, the issue is not limited to appeals taken to the courts of appeals. It also arises as a threshold matter when a district court reviews a bankruptcy court's determination whether to enforce a foreign judgment

based on comity. See, *e.g.*, *In re Travelstead*, 227 B.R. 638, 656 (D. Md. 1998) (reviewing for abuse of discretion bankruptcy court's decision that comity did not require yielding to Dutch court orders).

C. Review of the first issue presented is also warranted because the decision of the Eleventh Circuit is wrong. The Second Circuit's decision in *Diorinou* sets forth the correct framework for analyzing the standard-of-review question. This case involves the invocation of international comity as a basis for according res judicata effect to the orders of the Korean bankruptcy court. As Judge Newman correctly explained, that kind of retrospective use of the comity doctrine is properly subject to *de novo* review on appeal. It raises legal issues, not issues that are fundamentally discretionary in nature.

The *de novo* standard of review is also preferable because it preserves the parity principle animating the doctrine of international comity. *De novo* review applies to res judicata rulings concerning *domestic* judgments; there is no good reason why *foreign* judgments should receive different treatment.[6]

Finally, we note that use of an abuse-of-discretion standard of review is particularly inappropriate where, as here, a trial court has applied the comity doctrine to *dismiss* the lawsuit of

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[6] The Eleventh Circuit's suggestion that "[t]he principle of international comity applied in this case is *an abstention doctrine*" (App., *infra*, 10a (emphasis added)) is manifestly incorrect. As this Court has recognized, the "principles of equity, comity, and federalism" that underlie *Younger* abstention "have little force in the absence of a pending state proceeding." *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974) (internal quotations omitted). Equally inapposite, by definition, is *Pullman* abstention once unsettled questions of state law have been resolved by a final judgment. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 501 (1941). The use of comity by the district court thus bears no resemblance to abstention.

a U.S. litigant based on a foreign judgment. When a district court invokes comity as a basis for closing the courthouse doors, the argument for heightened appellate review is especially strong – particularly where, as here, it is not only petitioner's claims that have been extinguished (but also the claims of petitioner's many creditors in the U.S. bankruptcy proceeding that will be adversely affected by the trial court's dismissal). Whatever merit a deferential standard of review has when a motion to dismiss based on comity is *denied*, it has little to recommend it when comity is used to shut the courthouse doors entirely to a U.S. litigant. See note 5, *supra* (explaining that the Second Circuit applies a "more rigorous" standard of review even to rulings based on abstention because such rulings are in derogation of the duty of federal courts to exercise jurisdiction granted them by Congress). For all of these reasons, this Court should grant review of the first question presented.

II. The Court Of Appeals' Unwarranted Expansion Of The Scope Of The Comity Doctrine Also Deserves Review

The panel majority extended the principle of comity far beyond its traditional scope in two compounding respects. First, the court held that a foreign order approving a foreign debtor's plan of reorganization precluded all of petitioner's claims against *non-debtor* parties. In this respect, the Eleventh Circuit's decision squarely conflicts with a decision of the Third Circuit. Beyond that, the court sustained the application of comity to bar claims that were not, and could not have been, raised in the foreign proceeding. These dramatic expansions of the doctrine of comity warrant this Court's review.

A. To place this issue in context, it must be remembered that the fundamental purpose of the bankruptcy laws is to protect the *debtor* and its property – not to protect third parties who are not the debtors in the bankruptcy proceeding from claims against them. See, *e.g.*, *In re Jet Fla. Sys., Inc.*, 883 F.2d 970, 975 (11th Cir. 1989); *In re Lowenschuss*, 67 F.3d 1394,

1401 (9th Cir. 1995). This principle is not unique to bankruptcy law in the United States; the Corporate Recovery Act of Korea ("CRA") is to the same effect. See CRA Art. 241 (providing that, upon plan approval, "the *company* shall be exempted" from specified liabilities) (emphasis added) (Doc 126, Ex 33-B).

Consistent with this overarching purpose of bankruptcy law, the comity doctrine has historically and consistently been applied only to claims against *the debtor or the debtor's property*. For example, in *Canada Southern Railway Co.* v. *Gebhard*, 109 U.S. 527, 539 (1883), this Court held that claims of U.S. creditors against a Canadian debtor were barred by the debtor's discharge in a Canadian insolvency proceeding. In *Victrix S.S. Co.* v. *Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), the court of appeals, in extending comity to a Swedish bankruptcy proceeding with respect to a claim against the Swedish *debtor*, explained the rationale for such deference:

> The equitable and orderly distribution of *a debtor's* property *requires assembling all claims against the limited assets in a single proceeding*; if all creditors could not be bound, a plan of reorganization would fail.

Id. at 713-14 (emphasis added). This theme of assembling in one proceeding all claims against the *foreign debtor* and *its* assets permeates the case law addressing the application of comity to foreign insolvency proceedings.[7]

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[7] See, *e.g.*, *Finanz AG Zurich* v. *Banco Economico S.A.*, 192 F.3d 240 (2d Cir. 1999) (barring suit on claims against Brazilian guarantor that was subject to Brazilian liquidation proceeding); *Haarhuis* v. *Kunnan Enters., Ltd.*, 177 F.3d 1007 (D.C. Cir. 1999) (barring claims against Taiwanese corporation subject to Taiwanese insolvency proceeding); *Cunard S.S. Co.* v. *Salen Reefer Servs. AB*, 773 F.2d 452 (2d Cir. 1985) (holding that English creditor could not assert claims in New York against Swedish debtor subject to Swedish bankruptcy).

This rationale, however, has no application here. Respondents are not the debtors in a foreign bankruptcy. The assertion of petitioner's claims against the respondents would not affect the equitable, orderly and ratable distribution of DWMC's property to DWMC's creditors.[8] Nevertheless, the district court applied comity to the Korean Reorganization Court's plan approval order to bar claims against parties *other* than the foreign debtor, brought by a *different debtor* with a *different* set of creditors in a U.S. bankruptcy case. Such an unprecedented extension of comity was highly prejudicial to the interests of the creditors who are the real parties in interest in the U.S. proceeding – thousands of creditors of Daewoo America have filed over $840 million in claims against Daewoo America.[9]

Remarkably, the Eleventh Circuit did not even address the prejudice to petitioner's U.S. creditors in affirming this unprecedented expansion of comity. The Eleventh Circuit thus disregarded a critical component of the doctrine of international comity, as articulated by this Court over a century ago, when this Court instructed that judges applying the comity doctrine must "hav[e] due regard both to international duty and convenience, *and to the rights of its own citizens, or of other persons who are under the protection of its laws*." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895) (emphasis added).

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[8] Indeed, the MTA specifically contemplated the possibility of a suit such as this one by petitioner against the respondents and indemnified the respondents against such suit. See note 12, *infra*.

[9] While this appeal was pending, the district court issued an opinion dismissing on comity grounds all of the complaints filed by Daewoo automobile dealers against respondents GM, GMDAT, and American Suzuki seeking to recover for financial losses the dealers suffered following the implementation of the MTA. See Order, *In re Daewoo Motor Co. Ltd., Dealership Litigation*, MDL-1510, 2005 U.S. Dist. LEXIS 43197, at *15 (M.D. Fla. Jan. 6, 2005).

B. The panel majority's extension of comity to preclude claims against parties *other* than the foreign debtor directly conflicts with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260 (3d Cir. 1987). In that case, Remington Rand Corp. ("Remington U.S.") brought an adversary action in bankruptcy against two affiliated corporations, Business Systems Inc., B.V. ("BSI B.V.") and BSI Office Equipment, Inc., ("BSI U.S."). *Id.* at 1261. Remington U.S. alleged that BSI B.V. and BSI U.S. had misappropriated trade secrets on how to produce an electric typewriter that Remington U.S. had originally licensed to its Dutch subsidiary, Remington Rand B.V. ("Remington B.V."), to use in manufacturing the typewriters at its Dutch plant. *Id.* at 1262. After Remington B.V. entered into the Dutch equivalent of reorganization under Chapter 11 of the U.S. Bankruptcy Code, the Dutch trustees sold the Dutch plant, along with the know-how to produce the typewriter, to BSI B.V. *Ibid.* Remington U.S. claimed that BSI B.V. misappropriated its trade secrets when it bought the Dutch plant from Remington B.V., and subsequently filed an amended complaint that named BSI U.S. as an additional defendant. *Ibid.* The district court entered judgment against BSI B.V. and BSI U.S. *Id.* at 1263.

On appeal, BSI B.V. and BSI U.S. argued that the Dutch court's approval of the Remington B.V. trustees' sale to BSI B.V. of the trade secrets precluded Remington U.S.'s claims against them. *Id.* at 1265. The Third Circuit disagreed, holding, *inter alia*, that non-debtors in the foreign proceeding were not entitled to invoke comity principles designed to protect the foreign debtor. As the court explained, Remington B.V.'s bankruptcy "cannot be used as a shield" by BSI B.V. and BSI U.S., because it would not serve the rationale of granting comity, namely "to allow a foreign debtor's assets to be distributed equitably." *Id.* at 1267.

Other courts have reached the same conclusion. See, *e.g.*, *BDL International* v. *Sodetal USA, Inc.*, 377 F. Supp. 2d 518

(D. S.C. 2005) (rejecting defendants' arguments that plaintiff's complaint should be dismissed due to contemporaneous French proceedings because "[t]he French action only concerns the assets of the debtor Thalatrans and will not include issues important here, such as whether [defendant Sodetal USA, Inc.] is liable as consignee under the contract"); *Philadelphia Gear Corp.* v. *Philadelphia Gear de Mexico, S.A.*, No. Civ. A. No. 91-6250, 1995 U.S. Dist. LEXIS 15629, at *8 (E.D. Pa. Oct. 25, 1995) (Mexican bankruptcy of defendant not entitled to international comity because domestic action brought by plaintiff did not seek "any relief compelling [defendant] to part with property which would interfere with the Mexican Bankruptcy Court's equitable distribution of [defendant's] assets.").

The panel majority took a sharply conflicting path. It allowed respondents, none of which was the debtor in the Korean proceeding, to use DWMC's insolvency proceeding as a shield against petitioner's claims for damages and other relief. As in *Remington Rand*, the dismissal of petitioner's claims did nothing to serve the purpose of extending comity "[i]n matters concerning bankruptcy" – to "enable[] the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." App., *infra*, 14a (internal quotation marks omitted). If allowed to proceed, petitioner's claims against respondents would *not* have disturbed the Korean Reorganization Court's distribution of *DWMC*'s assets. As Judge Tjoflat correctly noted, petitioner sought damages on thirteen out of fourteen claims, and "[a]warding Daewoo America damages pursuant to its claims * * * would *do nothing to disturb* GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." App., *infra*, 27a n.8 (emphasis added).

Nor is this all. As Judge Tjoflat pointed out, Daewoo America's successor liability claim was "directed at GMDAT,

not [DWMC]. Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale, [Daewoo America's claim for successor liability] is simply seeking to *enforce* the bankruptcy court's order." App., *infra*, 33a (emphasis added). Thus, the panel majority was simply wrong in characterizing petitioner's claims as seeking "to redistribute the assets that were transferred with the approval of the Korean court." *Id.* at 18a.

C. The panel majority then stretched the doctrine of international comity one step further: it granted the foreign judgment preclusive effect even as to claims that the foreign court did not have authority to adjudicate. It is one of the "most basic principles of res judicata" that a party does not have to sue another "in a forum where it could not receive full relief." *Atlanta Retail*, 456 F.3d at 1285. It follows that a previous proceeding cannot be used as a bar to claims that could not have been adjudicated there. See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982).

The Eleventh Circuit's holding flatly contravenes this bedrock principle. It is also in serious tension if not outright conflict with this Court's decision in *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985), and with the many courts of appeals' decisions that have articulated and applied this principle in non-bankruptcy cases. In *Marrese*, this Court held that res judicata cannot bar a federal antitrust claim that was not within the jurisdiction of the state court that adjudicated the plaintiff's other claims, despite the fact that the claims were all based on the same set of facts. *Id.* at 382 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c)). To the same effect is the Second Circuit's decision in *Brody* v. *Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003), that a landowner's constitutional challenges to the procedures used by the Village to condemn his property were not precluded on res judicata grounds based on the condemnation proceedings themselves because those challenges, by statute, fell under the exclusive

jurisdiction of the appellate division. Res judicata, the Second Circuit explained, "will not apply * * * where the initial forum did not have the power to award the full measure of relief sought in the later litigation." *Id.* at 114 (internal quotation marks omitted).[10]

In this case, the Eleventh Circuit expanded the claim-preclusive effect of the Korean Reorganization Court's order beyond matters that were within the foreign court's jurisdiction, and barred petitioner's claims against entities that were not the debtor, even though petitioner's claims were not, and could not have been, addressed by the Korean court's order approving the reorganization plan for DWMC. As explained in note 3, *supra*, although the Korean Reorganization Court had the ability to adjudicate and discharge claims against the debtor, DWMC, that arose *prior* to the commencement of DWMC's reorganization proceedings, it lacked the authority to adjudicate claims brought against *non-debtor parties* that arose *after* the commencement of the reorganization proceedings. Many of petitioner's claims[11] did not address the validity of the acquisition itself (the only

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[10] Other courts of appeals have reached the same result. See, *e.g.*, *Waid*, 91 F.2d at 866 (Title IX claim not precluded by res judicata because the Equal Rights Division had exclusive jurisdiction over appellant's state law claims, precluding the appellant from consolidating her claims into a single lawsuit); *Clark*, 966 F.2d at 1321 (arbitration award did not bar appellant's federal securities claims because of district court's refusal to compel arbitration of such claims). See also *In re Birting Fisheries, Inc.*, 300 B.R. 489 (B.A.P. 9th Cir. 2003) (res judicata does not apply to bar a claim that was not addressed in the prior foreign proceeding).

[11] These include petitioner's claims against GM for fraud, tortious interference with contract, tortious interference with prospective economic advantage, and violations of Florida law; against GMDAT for successor liability; and against all respondents for constructive termination of the Distribution Agreement and violations of Florida law. See App., *infra*, 30a-37a.

issue before the Korean Reorganization Court) at all, but were instead based on respondents' conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from DWMC.[12] See App., *infra*, 30a-37a. Thus, opposing the acquisition in the Korean Reorganization Court would not (and could not) have provided petitioner with "an adequate vehicle to assert fully [its damages claims]" against respondents – only this Court's review can afford the petitioner its "day in court." *Piper Aircraft*, 244 F.3d at 1304.

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The implications of the Eleventh Circuit's decision are far-reaching. If the majority's opinion is allowed to stand, then foreign judgments will be afforded far greater preclusive effect in the Eleventh Circuit than judgments that are rendered by our own courts, in direct conflict with the precedents of other circuits. This Court should resolve these conflicts now and provide the lower courts with much-needed guidance concerning the scope of international comity.

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[12] As part of the asset transfer, respondents are indemnified from "any and all Damages incurred or suffered," backed by $215 million in assets, that arise out of

> (x) the consummation of any of the Transactions or otherwise arising out of the consummation of the Reorganization Plan, but only to the extent such Damages arise out of (i) the assertion of a claim by a wholly-owned Subsidiary of [DWMC] (other than the Acquired Subsidiary) with respect to such consummation.

Because petitioner was "a wholly owned subsidiary" of DWMC, this indemnity covers petitioner's claims against respondents arising from the "consummation of any Transactions" under the MTA or the Modified Plan. Thus, to allow petitioner's damages claims to go forward would not disturb the asset transfer, and indeed, such claims were anticipated (and indemnified against) as part of the transaction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15878-1

D.C. Docket No. 04-00201-CV-ORL-31-KRS

DAEWOO MOTOR AMERICA, INC.,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORP.,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,

Defendants-Appellees.

GM DAEWOO AUTO & TECHNOLOGY CO.,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

(August 11, 2006)

Before: TJOFLAT, PRYOR and ALARCÓN,* Circuit Judges

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

PRYOR, Circuit Judge:

The main issue presented in this appeal is whether the district court abused its discretion when it dismissed several claims of Daewoo Motor America, Inc., against General Motors Corporation, Suzuki Motor Corporation, American Suzuki Motor Corporation, and GM Daewoo Auto & Technology Co. (GMDAT) on the ground of international comity. Daewoo America complained that its legal rights, as the exclusive distributor of Daewoo vehicles in the United States, were violated after a Korean bankruptcy court approved a sale of the assets and liabilities of the Korean parent company of Daewoo America and the defendants then sold in the United States automobiles manufactured by GMDAT. Daewoo America was a claimant represented by counsel in the Korean bankruptcy proceedings but, after notice, did not object to the sale of the assets and liabilities of its Korean parent. We affirm.

I. BACKGROUND

Daewoo America was incorporated in 1997 as a wholly owned subsidiary of Daewoo Motor Co., Ltd. (Daewoo Korea), a South Korean automobile manufacturer. Daewoo America served as the exclusive distributor of Daewoo automobiles in the United States and the exclusive provider of warranty services and replacement parts. On November 18, 1999, Daewoo Korea and Daewoo America entered into an Automobile Purchase and Distribution Agreement. Under the Agreement, Daewoo Korea agreed to sell to Daewoo America certain "Products" and granted to Daewoo America "the exclusive right to distribute, sell, rent, lease and otherwise dispose of . . . and service . . . the Products in the United States. . . ." The Agreement also provided that "'Products' shall mean the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor

vehicle models)." The parties agree that "Exhibit A" never existed and was not attached to the Agreement.

On November 10, 2000, after experiencing financial difficulties, Daewoo Korea filed for bankruptcy protection in Korea under the Korean Corporate Reorganization Act, and the Korean court appointed a receiver. By letter dated November 8, 2000, Daewoo Korea notified Daewoo America of its reorganization plans. The letter included a summary of Korean reorganization law. The letter also warned that creditors must participate in the reorganization and that failure to file a claim would result in a loss of rights.

On November 14, 2002, the Korean bankruptcy court ordered the preservation of the assets of Daewoo Korea. On November 30, 2000, the court ordered the commencement of the reorganization procedure and set the deadline of January 15, 2001, for filing claims. On December 5, 2000, the receiver for Daewoo Korea sent Daewoo America a notice of the filing deadline and guidelines on how to file a claim. In response, Dong Jin Lee, President of Daewoo America, communicated with representatives of Daewoo Korea to obtain assistance with filing a claim in the reorganization proceeding and with employment of an attorney. With the aid of Daewoo Korea, Daewoo America retained the law firm Jin & Lee and executed a Power of Attorney in favor of the firm. Daewoo Korea also appointed agents to act on behalf of Daewoo America in the Korean proceedings. Daewoo America did not object to the appointments.

With the aid of Jin & Lee, Daewoo America filed a proof of claim before the Korean court for approximately $33 million, and on February 3, 2001, filed a supplemental claim for over $45.5 million. On February 26, 2001, the creditors of Daewoo Korea held a meeting at which they reviewed the claims. Jin & Lee attended the meeting on behalf of Daewoo America. The Receiver objected to most of the claims of Daewoo America,

which was notified of the objections by the Korean court. The Korean court also notified Daewoo America that it was required to affirm its claims by filing a claim against the Receiver by the end of March.

Daewoo America then filed a complaint in the Korean court against the Receiver and Daewoo Korea. Daewoo America challenged the objections of the Receiver and sought approval of its claims. The following month, Daewoo America dismissed its complaint. In 2002, Daewoo America filed a second supplemental claim for approximately $1.1 million, which the Receiver approved in its entirety.

Both before and during its reorganization proceedings, Daewoo Korea negotiated with Ford Motor Company and GM about the possibility of a transfer of ownership. In September 2000, Ford withdrew its bid, but negotiations with GM continued. On September 20, 2001, Daewoo Korea and GM executed a non-binding Memorandum of Understanding regarding the sale of assets of Daewoo Korea to GM. The Korean court approved the Memorandum of Understanding on September 26, 2001.

Daewoo America contends that it was to be included in the assets to be purchased by GM, and GM affirmatively represented that Daewoo America would continue to distribute automobiles in the United States under the acquisition plan intended by GM. At an automobile convention in January 2002, GM executives allegedly represented that they looked forward to a working relationship between Daewoo America and GM. Daewoo America alleges that it continued to expand its business based on these representations by GM.

On March 27, 2002, the management team of Daewoo America wrote to GM regarding the possible exclusion of Daewoo America from the asset acquisition. The management team expressed its "extreme concerns about the far reaching negative implications of the possible exclusion of . . . U.S.

operations from the agreements associated with General Motors' pending acquisition of certain assets of Daewoo Korea." The letter also expressed concern about the "potential breach arising from the Automobile Purchase and Distribution Agreement between Daewoo Korea and Daewoo America."

By a letter dated April 17, 2002, Daewoo Korea notified Daewoo America of a meeting to examine the proposed reorganization plan to be held on May 6, 2002. Daewoo America also received a letter of proxy and a summary of the proposed reorganization plan. The summary of the proposed reorganization did not refer to the Memorandum of Understanding or the proposed asset transfer. Despite the concerns expressed in the March 27, 2002, letter, Daewoo America executed the proxy and thereby accepted "the Proposed Reorganization Plan filed by the receiver" and granted to "Han Su Pyon, . . . an officer of [Daewoo Korea], the full power and authority to exercise its voting rights in the meeting of parties in interest as though exercised by the undersigned."

On April 30, 2002, GM, Daewoo Korea, and creditors of Daewoo Korea entered into a Master Transaction Agreement (MTA). The MTA contemplated the creation of a new company, GMDAT, to acquire assets and assume liabilities of Daewoo Korea. Among the assets to be acquired were the vehicle manufacturing plants at which the Daewoo automobiles to be exported for sale in the United States were manufactured. Daewoo America was not included in the assets to be transferred. At the May 6, 2002, meeting of the creditors, the creditors voted in favor of the original reorganization plan. The Korean court approved the plan, but requested that the receiver file a modified reorganization plan that reflected the terms of the MTA entered on April 30, 2002.

At the same time, the Receiver for Daewoo Korea sought permission from the Korean court to terminate the distribution agreement with Daewoo America for non-payment of

approximately $130 million. The Korean court approved the petition of Daewoo Korea on May 6, 2002. The Receiver sent a letter to Daewoo America requesting payment of the outstanding debt, barring which the Distribution Agreement would be terminated.

On April 21, 2002, Daewoo Korea requested permission from the Korean court for Daewoo America to file for bankruptcy in the United States. The Korean court approved the petition, and on May 16, 2002, Daewoo America filed for protection under Chapter 11 in the United States Bankruptcy Court for the Central District of California. In proceedings before the California bankruptcy court, Daewoo America stated that it "fully intend[ed] to pursue all possible causes of action against Daewoo Korea, GM and others, if appropriate." In a letter to counsel for GM dated June 7, 2002, counsel for Daewoo America advised that "[Daewoo America] deems any action by GM to distribute automobiles in the United States manufactured at facilities of Daewoo Motor Co., Ltd. to be a violation and infringement of [Daewoo America's] exclusive right to distribute [Daewoo America] automobile products in the United States."

On September 12, 2002, Daewoo Korea filed a modified reorganization plan that included the terms of the MTA. Daewoo Korea then sent a letter to its creditors to inform them that a meeting on the modified reorganization plan was scheduled for September 30, 2002. Daewoo America received another proxy form to vote on the modified plan. In response to the filing of the modified reorganization plan, Korean counsel for Daewoo America advised that Daewoo America should file its claim in the Korean bankruptcy proceeding promptly. Counsel for Daewoo America in turn notified its creditors' committee, which was authorized by the California bankruptcy court to pursue claims against Daewoo Korea on behalf of Daewoo America, of the need to "promptly take the necessary action to protect the estate's interest."

On September 30, 2002, the creditors of Daewoo Korea adopted and the Korean court approved the modified reorganization plan, which included the MTA. Despite its notice of the meeting and warnings from counsel, Daewoo America did not attend the September 30 meeting and did not execute a proxy to vote for or against the modified reorganization plan. Daewoo America also did not assert any further claims against Daewoo Korea in the Korean court.

On October 17, 2002, GM, Daewoo Korea, and the creditors of Daewoo Korea closed the transactions under the MTA in which assets of Daewoo Korea were transferred to GMDAT. In February 2003, GM and its affiliate American Suzuki announced that they would begin selling automobiles manufactured by GMDAT in the United States under the Chevrolet and Suzuki brands. GMDAT would continue to use the Daewoo brand name in South Korea and all other countries in which GMDAT had acquired subsidiaries. In July 2003, GMDAT announced that its first shipment of vehicles had been made to North America.

On July 22, 2003, Daewoo America filed an action against GM, GMDAT, Suzuki, and American Suzuki in the California bankruptcy court and alleged fraud, tortious interference with contract, tortious interference with prospective economic advantage, aiding and abetting breach of fiduciary duty, violation of the Cartwright Act, unfair competition, unjust enrichment, successor liability, fraudulent transfer, and violation of the automatic stay. Daewoo America sought damages and injunctive relief. The following day, Daewoo America moved the California bankruptcy court to issue a temporary injunction to prevent GM and American Suzuki from importing or selling in the United States any vehicles manufactured by GMDAT. The court denied the motion.

In August 2003, GM and American Suzuki moved to dismiss many of the claims brought by Daewoo America. In

October 2003, the motions were denied in part and granted in part. The California bankruptcy court dismissed several claims against GM and American Suzuki with leave to amend, but dismissed the claims for unjust enrichment and fraudulent transfer without leave to amend.

Daewoo America filed its amended complaint on November 20, 2003. The amended complaint included claims for fraud, tortious interference with contract, tortious interference with prospective economic advantage, aiding and abetting breach of fiduciary duty, violation of the Cartwright Act, unfair competition, successor liability, unauthorized post-petition transfer, violation of the automatic stay, and several claims under Florida and Massachusetts statutes. The defendants moved to dismiss the amended complaint on multiple grounds.

The California bankruptcy court dismissed the claims for violation of the Cartwright Act, unfair competition, and violations of the Massachusetts statutes without leave to amend; dismissed the claims under the Florida statutes with leave to amend; scheduled a hearing on the motions concerning the claims of successor liability, unauthorized post-petition transfer, and violation of the automatic stay; and denied the motions as to the claims of fraud, tortious interference with contract, tortious interference with prospective economic advantage, and aiding and abetting breach of fiduciary duty. In February 2004, the Judicial Panel on Multidistrict Litigation transferred the action to the United States District Court for the Middle District of Florida " 'for inclusion in the coordinated or consolidated pretrial proceedings occurring' for *In re Daewoo Motor Co., Ltd., Dealership Litigation,* MDL Docket No. 1510."

The transferee district court instructed the parties to submit supplemental briefs on the question of international comity and held a hearing on August 20, 2004. On August 26, 2004, the district court dismissed the amended complaint with prejudice

on the ground of international comity. *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 315 B.R. 148, 161 (2004). The district court also ruled that the Modified Reorganization Plan and MTA approved by the Korean court did not violate the automatic stay of the bankruptcy of Daewoo America because the Distribution Agreement did not give Daewoo America property rights in vehicles manufactured by GMDAT. *Id.* at 160.

The district court explained that granting comity to the Korean bankruptcy proceeding was proper for three reasons. First, the district court found that "Korea has significant interest in regulating business activity on its shores." *Id.* Second, the district court found that "any differences between Korean and U.S. bankruptcy law are minimal and do not offend U.S. notions of due process." *Id.* Third, the district court found that Daewoo America "had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process." *Id.* The district court concluded that the "fact that [Daewoo America] now seeks to hold GMDAT liable as the successor of [Daewoo Korea] highlights [Daewoo America's] true intention-to collaterally attack the entire Korean reorganization process and result." *Id.* at 161.

Daewoo America moved the district court for clarification and reconsideration of its order. The district court denied the motion to reconsider, and to the extent clarification was sought, clarified that the order dismissed all of the claims of Daewoo America against the defendants on the ground of comity. The district court entered final judgment for the defendants. Daewoo America appealed.

II. STANDARD OF REVIEW

The parties dispute the applicable standard of review. Daewoo America argues, on the one hand, that we should apply the *de novo* standard of review applicable to the review of an

order granting a motion to dismiss. The defendants argue, on the other hand, that we should review the decision of the district court only for abuse of discretion.

We agree with the defendants. The principle of international comity applied in this case is an abstention doctrine. *Ungaro-Benages v. Dresdner Bank AG,* 379 F.3d 1227, 1238 (11th Cir. 2004). "While we ordinarily review the grant of motions to dismiss or summary judgment *de novo, see Parks v. City of Warner Robins, Georgia,* 43 F.3d 609, 612-13 (11th Cir. 1995), 'a district court's decision to abstain will only be reversed upon a showing of abuse of discretion.' " *Boyes v. Shell Oil Prods. Co.,* 199 F.3d 1260, 1265 (11th Cir. 2000) (quoting *Rindley v. Gallagher,* 929 F.2d 1552, 1554 (11th Cir. 1991)).

We review the factual determinations of the district court for clear error and questions of law *de novo. Coloma v. Holder,* 445 F.3d 1282, 1284 (11th Cir. 2006). "An error of law constitutes an abuse of discretion." *Wexler v. Lepore,* 385 F.3d 1336, 1338 (11th Cir. 2004). The interpretation of a contract is a question of law that the court reviews *de novo. Tobin v. Mich. Mut. Ins. Co.,* 398 F.3d 1267, 1274 (11th Cir. 2005).

III. DISCUSSION

Daewoo America makes four arguments on appeal. First, Daewoo America argues that the district court erroneously concluded that the order of the Korean court that approved the reorganization of Daewoo Korea did not violate the automatic stay of the bankruptcy of Daewoo America. Second, Daewoo America argues that the order of the Korean court was not entitled to comity. Third, Daewoo America argues that, even if comity was appropriate, the order of the Korean court had no effect on the claims that Daewoo America raised against the defendants. Fourth, Daewoo America argues that the California

bankruptcy court erred when it dismissed the claim for unjust enrichment with prejudice. We address each argument in turn.

A. The Approval of the Modified Reorganization Plan of Daewoo America by the Korean Court Did Not Violate the Automatic Stay.

The Bankruptcy Code provides that a petition for bankruptcy "operates as a stay . . . of . . . any act to obtain possession of property of the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). "Property of the estate" is defined as "all legal or equitable interest of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1). The property of the estate of Daewoo America includes any contractual rights that it owned when it filed for bankruptcy.

Daewoo America contends that the Modified Reorganization Plan impaired its property rights in the exclusive distribution agreement with Daewoo Korea. Daewoo America contends that the district court erroneously interpreted the Distribution Agreement to conclude that the rights of Daewoo America under the Distribution Agreement were not impaired by the approval of the Modified Reorganization Plan and that the order of the Korean court did not violate the automatic stay. Daewoo America makes two arguments in support of this contention.

First, Daewoo America argues that the district court erroneously relied on federal, rather than California, law when it interpreted the Distribution Agreement. Daewoo America argues that, under California law, "even if the written agreement of the parties is clear and unambiguous on its face, the trial judge *must* consider relevant extrinsic evidence that can prove a meaning to which the language of the contract is reasonably susceptible." Because the district court interpreted the contract under federal law and only looked at the "plain language" of the

Distribution Agreement to interpret the contract, Daewoo America argues the interpretation of the district court was erroneous. The problem for Daewoo America is that it waived this argument.

Daewoo America failed to raise the choice of law in its arguments and motions before the district court, and Daewoo America failed to raise any question regarding the use of federal law in its motion for reconsideration of the order of the district court. *See William Penn Life Ins. Co. v. Sands*, 912 F.2d 1359, 1362 n. 2 (11th Cir. 1990). On the contrary, in its motion, Daewoo America stated that it "[did] not seek reconsideration of the Court's ruling that the Distribution Agreement does not cover vehicles manufactured by or on behalf of GMDAT." After having failed to raise the choice of law before the district court and, in fact, having disavowed any intention to seek reconsideration, Daewoo America cannot now argue that the law used in the interpretation of the contract by the district court was erroneous. *See id.*

Second, Daewoo America argues that the interpretation of the Distribution Agreement by the district court is not supported by the language of the contract. Daewoo America argues that the district court erroneously concluded that the Distribution Agreement "unambiguously contemplates that [Daewoo America] would distribute only those cars manufactured by [Daewoo Korea] and therefore would not extend to cars manufactured by GMDAT." *Daewoo Motor Am.*, 315 B.R. at 155. This argument fails.

We agree with the district court that the Distribution Agreement did not grant Daewoo America property rights in vehicles that are neither manufactured nor sold by Daewoo Korea. The "terms of the contract suggest only that [Daewoo America] had the exclusive right to sell or distribute the 'Products' of 'Seller' (that is, [Daewoo Korea]) and that [Daewoo America] had the exclusive right to distribute Daewoo

vehicles (not Suzuki or Chevrolet vehicles) in the United States." *Daewoo Motor Am.*, 315 B.R. at 155. The rights of Daewoo America under the Distribution Agreement did not extend to the manufacturing assets of Daewoo Korea transferred by the MTA.

Even under California law, which Daewoo America contends applies, we would affirm the district court. Although, as Daewoo America argues, under California law, whether a "contract is reasonably susceptible to a party's interpretation can be determined from . . . extrinsic evidence," *Cedars-Sinai Med. Ctr. v. Shewry*, 41 Cal. Rptr.3d 48, 60 (Cal. Ct. App. 2006), even considering the extrinsic evidence offered by Daewoo America, the Distribution Agreement is not reasonably susceptible to an interpretation that would give Daewoo America any rights in the vehicles manufactured by GMDAT and sold by Chevrolet and Suzuki. The district court correctly concluded that the order of the Korean court approving the Modified Reorganization Plan of Daewoo Korea did not affect any property interest of Daewoo America and did not violate the automatic stay.

B. The District Court Did Not Abuse Its Discretion by Granting Comity to the Order of the Korean Court.

Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). To determine whether comity is appropriate, we evaluate three factors: "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it

violated American public policy notions of what is decent and just." *Ungaro-Benages*, 379 F.3d at 1238. Courts also consider whether "the central issue in dispute is a matter of foreign law and whether there is a prospect of conflicting judgments." *Id.* In matters concerning bankruptcy "the extension of comity 'enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.'" *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003) (quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457-58 (2d Cir. 1985)).

Daewoo America argues that the decision of the district court to grant comity to the Korean order is flawed in four respects. First, Daewoo America argues that it did not have an opportunity to be heard on the claims that are raised in the current litigation and that it was not provided with adequate notice regarding the Modified Reorganization Plan. Second, Daewoo America argues that the application of comity in this case violates the public policy of the United States. Third, Daewoo America argues that the prejudice to its creditors in the United States outweighs any arguments in favor of comity. Fourth, Daewoo America argues that comity should be denied because the Korean court would not grant comity to a decision of the United States. All of these arguments fail.

The district court did not clearly err when it found that Daewoo America had notice of the proceedings in the Korean bankruptcy and an opportunity to participate in those proceedings. The record, which contains multiple notices received by Daewoo America and evidence of the participation of Daewoo America in the bankruptcy process, supports that finding. The argument of Daewoo America that its claims against the defendants were not heard does not refute that Daewoo America had notice of and participated in the Korean bankruptcy proceedings. Moreover, the record supports the conclusion of the district court that the notice received by

Daewoo America was adequate. The record evidences that Daewoo America received notice of all the main events of the bankruptcy proceedings, including the final meeting of the creditors on September 30, 2002, to vote on the Modified Reorganization Plan. Daewoo America chose not to attend the meeting, and Daewoo America did not either vote by proxy on or otherwise object to the Modified Reorganization Plan.

Daewoo America has not identified any "public policy notion[] of what is decent and just" that is offended by the application of comity to the Korean bankruptcy order. *Ungaro-Benages*, 379 F.3d at 1238. The district court did not abuse its discretion when it determined that the interests of Korea in regulating business activity on its shores and the interests of the courts in dispersing a debtor's assets equitably and systematically outweighed the prejudice to Daewoo America, *see Int'l Transactions, Ltd.*, 347 F.3d at 594, and reciprocity is not an absolute precondition to comity, *see Remington Rand Corp.-Del. v. Bus. Sys. Inc.*, 830 F.2d 1260, 1273 (3d Cir. 1987). The argument of Daewoo America also ignores that "the interest of the system as a whole – that of promoting 'a friendly intercourse between the sovereignties,' – also furthers American self-interest, especially where the workings of international trade and commerce are concerned." *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1053 (2d Cir. 1996) (internal citation omitted). Under The Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217, in fact, a Korean judgment is elevated to the status of a sister state judgment. *See Vagenas v. Continental Gin Co.*, 988 F.2d 104, 106 (11th Cir. 1993). The district court did not abuse its discretion when it granted comity to the order of the Korean court.

C. The District Court Did Not Abuse Its Discretion When It Found That the Claims of Daewoo America Were Intertwined with the Order of the Korean Court.

Daewoo America next argues that the scope of the comity granted to the order of the Korean court should not extend to its claims against the defendants because those claims were not and could not have been raised in the Korean bankruptcy proceeding. Daewoo America argues that because its claims did not exist at the time of the Korean bankruptcy filing, they did not "arise out of the same nucleus of operative fact, [and were not] based upon the same factual predicate, as the Plan Approval Order," and were not necessarily put at issue by the Korean proceedings. These arguments fail.

The claims of Daewoo America arise out of the same nucleus of operative facts considered by the Korean court. The claims of Daewoo America are based on the Modified Reorganization Plan and MTA, which were approved by the Korean court. The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court. The complaint of Daewoo America regarding the effect of the MTA should have been raised before the Korean court. Daewoo America cannot now collaterally attack that order by bringing claims against the recipients of the property transferred based on the approval by the Korean court.

The collateral nature of the claims of Daewoo Korea is made more apparent by its request for relief. On eleven of fourteen claims, the relief sought is an injunction against the defendants. On another claim, the relief sought is that the "transfer be set aside." Because granting the relief sought would require the court to set aside the asset transfer to the defendants, which was approved by the Korean court, the complaint is a collateral attack on the order of the Korean court. *See Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972)

("Even though an action has an independent purpose and contemplates some other relief, it is a collateral attack if it must in some fashion overrule a previous judgment.").

The reliance of Daewoo America on *In re Piper Aircraft Corp.*, 244 F.3d 1289 (11th Cir. 2001), and *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990), is misplaced. In *In re Piper Aircraft*, this Court concluded that the complaint of Kaiser Aerospace and Electronics Corp. against Teledyne Industries, Inc., for breach of contract, breach of fiduciary duty, and constructive trust, was not barred by res judicata because "the facts underpinning the . . . action (i.e., Teledyne's alleged breach of [contract] and its fiduciary duties to Kaiser) were not at issue in the confirmation proceeding." 244 F.3d at 1297. In contrast, the facts underpinning the complaint of Daewoo America against the defendants were at issue in the Korean proceeding because those facts relate to the approval of the Modified Reorganization Plan and the MTA. The claims of Daewoo America rely entirely on the alleged invalidity of the transactions approved by the Korean court.

Second, *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.* is inapposite. In *La Preferida*, the Seventh Circuit concluded that the suit of La Preferida against Cerveceria Modelo for tortious inference with a contract between La Preferida and Corona was not barred by the entry of a consent judgment in the bankruptcy proceedings of Corona. *La Preferida*, 914 F.2d at 907. The court concluded that the consent judgment was ambiguous and applied the general rule forbidding the application of collateral estoppel to consent judgments. *Id.* In contrast with *La Preferida*, the district court did not apply comity to bar the claims of Daewoo America because of a consent judgment. The district court dismissed the claims of Daewoo America because the relief sought by Daewoo America undermined the orders of the Korean court regarding the reorganization of Daewoo Korea.

This case is more akin to *Miller v. Meinhard-Commercial Corp.*, in which Miller, a creditor in a bankruptcy proceeding, sued Meinhard-Commercial, another creditor, for fraud nine months after the bankruptcy plan had been confirmed. Miller alleged that he had been fraudulently induced to acquiesce in the bankruptcy plan. 462 F.2d. at 359. The court rejected Miller's suit as a collateral attack upon the bankruptcy proceedings:

> Through his fraud action, Miller is indirectly asserting that the Chapter XI proceeding should never have been approved and that a Chapter X procedure should have been decreed instead. The suit obviously turns upon what could or should have happened in the bankruptcy proceeding. It is specious to argue that Miller's action in fraud is unrelated or only coincidentally related to the merits of the bankruptcy proceeding.
>
> . . . .
>
> . . . The very gist of this suit is the allegation that the arrangement was somehow improper. To sanction it would be in effect to reopen the bankruptcy proceedings and retry the merits in a collateral proceeding.

Id. at 360-61.

The complaint of Daewoo America, likewise, turns on what happened in the Korean bankruptcy proceeding and is inextricably intertwined with the order of the Korean court. In effect, Daewoo America seeks to redistribute the assets that were transferred with the approval of the Korean court. The district court did not abuse its discretion when it dismissed the claims of Daewoo America on the ground of comity.

D. The California Bankruptcy Court Did Not Err When It Dismissed with Prejudice the Claim of Daewoo America for Unjust Enrichment.

The final argument of Daewoo America is that the California bankruptcy court erred when it dismissed the claim of Daewoo America for unjust enrichment without leave to amend. Under California law, a quasi-contract claim for unjust enrichment cannot lie when there is a written contract that covers the same subject matter. *Cal. Med. Ass'n v. Aetna U.S. Healthcare, Inc.*, 114 Cal. Rptr. 2d 109, 125 (Cal. Ct. App. 2001). Because all the claims of Daewoo America, including the unjust enrichment claim, rely on the existence of a written contract, amendment would be futile and the California bankruptcy court did not err when it dismissed the unjust enrichment claim without leave to amend.

IV. CONCLUSION

The dismissal of the complaint of Daewoo America is

AFFIRMED.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the judgment of the court, but I write separately because I do not believe that international comity entirely disposes of Daewoo America's Amended Complaint. Contrary to the court's decision, Daewoo America's entire lawsuit does not "turn[] on what happened in the Korean bankruptcy proceeding," *ante* at [18a], nor is it "inextricably intertwined with the order of the Korean court," *id.* For the vast majority of Daewoo America's claims, the proceedings before the Korean bankruptcy court serve as little more than a factual backdrop. When properly understood, most of Daewoo America's claims solely concern the defendants' dealings with Daewoo America, separate and distinct from the transfer of Daewoo Korea's manufacturing assets to GM and its partners. Stated differently,

this dispute simply is not part of the Korean bankruptcy, and granting international comity to the Korean bankruptcy court's orders does little to resolve it. The district court therefore could not have dismissed Daewoo America's entire Amended Complaint on the ground of international comity. In my view, analyzing the claims presented in the Amended Complaint, a task on which the court expends little effort, is the proper way to decide this appeal. Doing so reveals that the premises on which those claims rest are flawed, and that each claim in the Amended Complaint should be dismissed.[1]

Part I of the following discussion outlines the course of dealing between Daewoo America and GM. In its discussion of the facts underlying this dispute, the court chooses to focus mostly on the proceedings in the Korean bankruptcy court. While I have no quarrel with the accuracy of this account, I believe that providing more detail on the defendants' (and particularly GM's) alleged conduct vis-à-vis Daewoo America is required fully to understand this case. Part II discusses Daewoo America's claims in detail, and illustrates that most of them do not put the validity of the Korean bankruptcy proceeding in issue. Part III groups and analyzes those remaining claims, revealing them to be groundless. Part IV briefly concludes.

I.

Daewoo America was the seller, distributor and warranty provider of Daewoo automobiles in North America. On

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[1] I therefore would affirm the district court's disposition of this case which is why I concur in the judgment of the court. *See Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992) ("[T]his court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.").

November 18, 1999, Daewoo America and Daewoo Korea, its parent company, entered into the Distribution Agreement. The Distribution Agreement states, in relevant part:

> Whereas, Seller [Daewoo Korea] is the exclusive worldwide distributor of the Products (as defined in Section 1), which are manufactured by Seller;
>
> Whereas, Seller, as exclusive worldwide distributor has the right to grant to others the exclusive right to sell the products [sic] in certain regions, including the Territory (as defined in Section 2);
>
> . . .
>
> . . . Seller hereby agrees to sell to Buyer [Daewoo America] and Buyer hereby agrees to purchase from Seller the Products for resale or for rental or lease in the Territory. For purposes of this Agreement, "Products" shall mean the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor vehicle models) and the parts, accessories and equipment therefor, together with any warranty provided by the Seller at no cost to Buyer.[2]
>
> . . .
>
> Seller hereby grants to Buyer the exclusive right to distribute, sell, rent, lease and otherwise dispose of (collectively "Sell") and service, directly or through one or more subsidiaries or independent contractors, the Products in the United States and all territories and possessions thereof (collectively, "Territory"). Seller shall not Sell or service, directly or indirectly, or permit any other person or

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[2] Although the Distribution Agreement states that the "Products" covered by the agreement are enumerated in an attached "Exhibit A," the district court found, and the litigants agreed, that no such exhibit ever existed.

> corporation, partnership, limited liability company or their entity to Sell or service the Products in the Territory.

Doc. 144, Ex 7. The term of the agreement was ten years (unless terminated under certain conditions), and would automatically renew every five years unless either party specified otherwise. Daewoo Korea manufactured the vehicles and parts it delivered to Daewoo America at its plants in South Korea and Vietnam (the "Daewoo Korea Plants").[3]

Daewoo Korea filed for bankruptcy in South Korea in November 2000. The record makes clear that Daewoo America was fully aware of Daewoo Korea's financial distress, and knew that Daewoo Korea was negotiating the sale of a substantial portion of its assets to GM. Moreover, Daewoo America was on notice that those assets included the Daewoo Korea Plants. In a November 9, 2000 letter to its employees, Daewoo America stated that "under creditor and court imposed receivership, Daewoo Motor Korea is solidly positioned to proceed with concluding the transition of the company to a new owner on an accelerated basis, such as the possibility of General Motors." Doc. 123, Ex. 7. Around this time, Daewoo America claims that GM, without its knowledge, entered into negotiations with Suzuki for the purpose of forming an acquisition partnership for Daewoo Korea's assets. Am. Compl. ¶ 28.

Daewoo America alleges that GM promised to continue using it as the distributor of Daewoo vehicles and parts in the United States after it completed its acquisition of Daewoo

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[3] According to the Amended Complaint, the plants ultimately sold to GM and transferred to GMDAT "included those located in Changwoon and Kunsan, South Korea, and another located in Hanoi, Vietnam," and that GM also had "an obligation to acquire, pending the satisfaction of certain conditions, or the waiver of those conditions by [GMDAT], the Daewoo Korea plant in Bupyong, South Korea." Am. Compl. ¶ 51.

Korea's assets. Am. Compl. ¶ 34. Daewoo America further claims that, in reliance on this alleged promise, it initially continued to expand its dealership network by entering into new dealership agreements. *Id.* at ¶ 35.

On September 20, 2001, Daewoo Korea (and its bankruptcy receiver) entered into a non-binding Memorandum of Understanding (the "MOU") with GM. The MOU provided that certain Daewoo Korea domestic and foreign assets, including several manufacturing facilities, would be transferred to and controlled by a newly-formed company owned by GM and a consortium of investors (later named "GMDAT"). According to Daewoo America, it was listed among the sale assets described in the MOU. On September 26, 2001, the Korean bankruptcy court approved the MOU. At subsequent due diligence meetings between Daewoo America and GM, Daewoo America claims that GM specifically asked it temporarily to halt the appointment of new Daewoo dealers, because GM would be in a position to assist it in identifying new dealers once the acquisition closed. Am. Compl. ¶ 38.

Daewoo America claims that, at a November 9, 2001 meeting in Seoul, South Korea, GM again indicated that it would continue to be the primary distributor of Daewoo vehicles in North America. In reliance on these and other statements made by GM, Daewoo America claims that it refrained from adding new dealers to its network and continued to accumulate inventory at its ports. Am. Compl. ¶ 40. Daewoo America also purportedly secured GM's verbal promise that it would not "rebadge" the Daewoos it manufactured at the Daewoo Korea Plants. *Id.* The effect of such rebadging, presumably, would be to cut Daewoo America out of the distribution chain, because the Distribution Agreement authorized Daewoo America to sell and distribute vehicles under the Daewoo brand, and no others.

Daewoo America also asserts that during an automotive convention in or around January 2002, it had a display booth

next to that of GM and GM's financing arm, which "strongly implied the forthcoming anticipated alliance of [Daewoo America] with GM." Am. Compl. ¶ 42. Moreover, GM executives represented to Daewoo America during that convention that they looked forward to a working relationship between the two companies. *Id.*

Despite all of these promises from GM, Daewoo America still felt it necessary to express its "extreme concerns about the far reaching negative implications of the possible exclusion of [Daewoo America]'s U.S. operations from the agreements associated with General Motors' pending acquisition of certain assets of Daewoo Korea" in a letter dated March 27, 2002 to GM's senior executives. In Daewoo America's view, these concerns "include[ed] the potential breach arising from the [Distribution Agreement] between Daewoo Korea and [Daewoo America]." Doc. 124 Ex. 21 at DMA000071.

On April 30, 2002, Daewoo Korea and GM executed the Master Transaction Agreement ("MTA"). The agreement created GMDAT, which received certain of Daewoo Korea's assets, including the Daewoo Korea Plants. On September 12, 2002, Daewoo Korea filed a modified reorganization plan (the "Modified Plan"), which incorporated the terms of the MTA. Daewoo America was not among the assets sold in the transaction. The MTA also permitted the sale of Daewoo-brand vehicles throughout the world, and allowed vehicles manufactured at the Daewoo Korea Plants to be sold in North America under non-Daewoo brand names. In 2003, after the asset sale closed, GM and Suzuki announced that they would begin exporting vehicles manufactured at the Daewoo Korea Plants to the United States for sale under the Chevrolet and Suzuki brands.

Daewoo America's financial difficulty – much of which it blames on the defendants' purported misrepresentations and conduct – led it to seek Chapter 11 bankruptcy relief in the

United States Bankruptcy Court for the Central District of California on May 16, 2002. As part of the bankruptcy filing, an automatic stay under 11 U.S.C. § 362(a) was put in place, which froze Daewoo America's assets, brought them under the control of the bankruptcy court, and barred any other persons or entities from attempting to obtain possession of or exercise control over them.[4] Daewoo America thereafter instructed its United States and Korean counsel to explore potential causes of action arising out of Daewoo Korea's asset sale. It also communicated to the California bankruptcy court its full intention "to pursue litigation" against Daewoo Korea, GM, "and other parties relating to the sale of assets of Daewoo Korea to a consortium consisting of GM and certain creditors of Daewoo Korea." Doc. 125, Ex. 28. Daewoo America never notified the Korean bankruptcy court, or any other Korean Court, of its concerns with respect to GM's conduct.[5]

On July 22, 2003, Daewoo America commenced an adversary proceeding in the California bankruptcy court by filing a multi-count complaint (the "Original Complaint") against GM, GMDAT, Suzuki and American Suzuki. Reduced

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[4] "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the [bankruptcy] estate or of property from the estate or to exercise control over property of the estate. . . ." 11 U.S.C. § 362(a)(3).

[5] The "proof of claim" to which the court refers, *ante* at [3a], was against Daewoo Korea for various charges related to their parent/subsidiary relationship. These charges had nothing to do with the defendants or the claims in this lawsuit. Likewise, the complaint filed by Daewoo America against Daewoo Korea and its receiver, which it subsequently dismissed, did not involve the defendants' conduct. *Ante* at [4a].

to its essentials, the Original Complaint alleged that (1) Daewoo America reasonably relied on GM's misrepresentations, and (2) this gave GM and its partners the opportunity to supplant Daewoo America as the exclusive distributor of Daewoo automobiles in the United States. This outcome, according to Daewoo America, was fraudulent, and resulted in, among other things, injury to competition and unjust enrichment of the defendants.[6] To salve its injuries, Daewoo America requested both damages and injunctive relief. In further pursuit of its prayer for injunctive relief, Daewoo America moved the court to issue a temporary restraining order preventing the defendants from importing the Chevrolets and Suzukis manufactured at the Daewoo Korea Plants. The California bankruptcy court denied the motion. GM and Suzuki thereafter moved the court to dismiss most of Daewoo America's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). The California bankruptcy court denied the motions in part and granted them in part with leave to amend.

On November 20, 2003, Daewoo America filed an Amended Complaint,[7] which added several claims but was

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[6] Daewoo America's Original Complaint contained eleven counts or "claims." It is unnecessary to detail the allegations of these claims because, with the exception of its claim sounding in "unjust enrichment," which the California bankruptcy court dismissed for failure to state a claim for relief, they were replicated by the claims asserted in the Amended Complaint.

[7] The Amended Complaint, a typical "shotgun pleading" containing multiple counts, each incorporating by reference all the (usually irrelevant) allegations of previous counts, *see Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 n.9 (11th Cir. 2002), includes the following fourteen claims: (1) Fraud against GM; (2) Tortious Interference with Contract against GM; (3) Tortious Interference with Prospective Economic Advantage against GM; (4) Aiding and Abetting Breach of Fiduciary Duty

otherwise based on the same conduct alleged in the Original Complaint.[8] GM, GMDAT, and American Suzuki moved the bankruptcy court for dismissal pursuant to Rule 12(b)(6). The court denied GM's motion as to the First, Second, Third and Fourth Claims. The court granted the motions without leave to

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against GM; (5) Violation of the Cartwright Act against all defendants; (6) Unfair Competition against all defendants; (7) Successor Liability against GMDAT; (8) Unauthorized Post-Petition Transfer (11 U.S.C. § 549) against all defendants (9) Violation of the Automatic Stay (11 U.S.C. § 362) against all defendants; (10) Violation of the Automatic Stay (11 U.S.C. § 362) against GM; (11) Constructive Termination of the Distribution/Franchise Agreement (Fla. Stat. § 320.641) against all defendants; (12) Illegal Conduct Related to Motor Vehicle Business (Fla. Stat. § 320.64(4)) against GM; (13) Termination of the Distribution Agreement (Mass. Stat. 93B § 4(c)(12)) against GM, and; (14) Constructive Termination of the Distribution Agreement (Mass. Stat. 93B § 5) against all defendants. These claims are described in full in the text, *infra*.

[8] The court states that "[o]n eleven of fourteen claims, the relief sought [by Daewoo America] is an injunction against the defendants," and "[o]n another claim, the relief sought is that the transfer must be set aside." *Ante* at [16a] (internal quotation omitted). While in a sense true, this observation is somewhat misleading. Daewoo America did ask for injunctive relief on eleven of its claims, but it also asked for *damages* on *thirteen* of them. In fact, it asked exclusively for damages in two claims, whereas it asked exclusively for an injunction in only one. Curiously, the court neglects to mention any of this. I can only conclude that its omission was calculated to bolster its argument that giving Daewoo America the relief it has requested would require us to unwind the asset sale to GM, and would also require us to invalidate the Korean court's orders and proceedings. Awarding Daewoo America damages pursuant to its claims, however, would do nothing to disturb GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets.

amend as to the Fifth, Sixth, Thirteenth and Fourteenth Claims. The court also granted the motions with respect to the Eleventh and Twelfth Claims, but with leave to amend. To determine Daewoo America's rights under the Distribution Agreement, and to consider whether the Korean bankruptcy court's approval of the asset sale should be accorded international comity, the court deferred ruling on the motions to dismiss Daewoo America's Seventh, Eighth, Ninth and Tenth Claims. In so doing, the court recognized the possibility that a judgment for Daewoo America on these claims could constitute a collateral attack on the Korean bankruptcy court's orders.

Before the bankruptcy court could hear argument on the international comity issue, the Judicial Panel on Multidistrict Litigation (the "JPML") transferred the proceeding to the United States District Court for the Middle District of Florida, where several Daewoo automobile dealerships had filed suit against GM, GMDAT and American Suzuki.[9] That court, like the California bankruptcy court before it, instructed the parties to submit supplemental briefs on whether international comity should bar Daewoo America's claims. After an August 20, 2004 hearing, the court entered an order dismissing the Amended Complaint with prejudice.[10]

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[9] In claims similar to those filed by Daewoo America, several Daewoo dealerships accused GM, GMDAT and American Suzuki of being responsible for terminating the supply of Daewoo vehicles and parts that Daewoo Korea exported to the United States. The district court dismissed the dealerships' complaint with prejudice on January 6, 2005. *In re Daewoo Motor Co. Ltd. (Dealership Litigation)*, No. JPML-1510, January 6, 2005.

[10] In its order, the court made no mention of the California bankruptcy court's dispositive rulings on the merits of Daewoo America's claims. I can only assume that the court ruled as though it had the entire Amended Complaint before it, and thus dismissed the Amended Complaint in its entirety.

The district court made two broad rulings. First, it concluded that the asset sale to GM did not violate the automatic stay put in place by Daewoo America's bankruptcy, because the Distribution Agreement gave Daewoo America no property rights in Daewoo Korea's assets. In other words, Daewoo America did not own any of the property Daewoo Korea sold to GM and its partners. Additionally, the Distribution Agreement did not support Daewoo America's contention that it had a perpetual right to sell and distribute cars manufactured in the Daewoo Korea Plants, regardless of who owned those plants and regardless of the branding of those cars. Its rights pertained specifically and exclusively to cars sold by Daewoo Korea under the Daewoo brand. Second, the court found that the remainder of Daewoo America's claims functioned as a collateral attack on the Korean bankruptcy court's orders approving the sale of Daewoo Korea's assets to GM. To avoid review of the Korean proceedings, and to accord them due respect, the court declined to exercise its jurisdiction on the grounds of international comity. The court concluded that doing so was appropriate because: (1) there is little difference between United States and Korean bankruptcy law; (2) Korea had a significant interest in the reorganization of Daewoo Korea, and; (3) Daewoo America was notified of and fully participated in the reorganization proceedings but chose not to oppose them.[11] Daewoo America

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[11] Pursuant to Federal Rule of Civil Procedure 12(b), a district court generally must convert a motion to dismiss into a Rule 56 motion for summary judgment if the court considers materials outside of or not attached to the complaint. *Day v. Taylor*, 400 F.3d 1272, 1275-76 (11th Cir. 2005). Under most circumstances, such material would not be part of the record underpinning a Rule 12(b)(6) ruling. *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999) (*citing* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 299 (2d ed.1990)). Here, the district court's dispositive order made reference to several documents, such as the Distribution Agreement and the MTA, that were not attached to the

moved the court to clarify and reconsider its decision. The court denied the motion and entered final judgment for GM and the other defendants. This appeal followed.

II.

As previously indicated, the Amended Complaint contains fourteen claims. Each is directed at the conduct of GM and the other defendants. In my view, only claims Four, Eight, Nine, and Ten, which I discuss in subsection II.B., necessarily implicate the validity of the Korean bankruptcy court's proceedings and orders. The remaining ten claims, by contrast, concern the defendants' conduct separate and apart from those proceedings and orders.

A.

The First Claim sounds in fraud.[12] The claim is that GM falsely represented that it would continue Daewoo Korea's distribution relationship with Daewoo America; that Daewoo America would have the exclusive right to sell and distribute the

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Amended Complaint. Nevertheless, "[o]ur prior decisions also make clear that a document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document" if that document is central to the plaintiff's claims. *Day*, 400 F.3d at 1276 (*citing Ivax Corp.*, 182 F.3d at 802 n.2). Clearly, the Distribution Agreement and the MTA are integral to the allegations contained in Daewoo America's Amended Complaint. Additionally, no party has contested the contents or authenticity of those documents. It was therefore unnecessary for the district court to convert the defendants' motions to dismiss into motions for summary judgment.

[12] For claims One through Four, and for Claim Seven, Daewoo America does not identify which state's law applies.

vehicles made at the Daewoo Korea Plants now operated by GMDAT; that Daewoo America reasonably relied on GM's misrepresentation to its detriment by foregoing its right to file a claim against Daewoo Korea during the Korean bankruptcy proceedings, or to otherwise oppose that court's approval of the asset sale; and that Daewoo America continued to purchase Daewoo Korea parts and to add dealerships to its network of dealers, based on its expectation that GM would keep its word.

The Second Claim, Tortious Interference with Contract against GM, is that Daewoo America's contracts have been interrupted "as a result of GM's acquisition" of the Daewoo Korea Plants. Daewoo America accuses GM of intentionally interfering with Daewoo Korea's performance of the Distribution Agreement (i.e., Daewoo Korea's delivery of cars) and, by extension, interfering with Daewoo America's ability to provide its dealerships with cars. The tort alleged here is not the GM acquisition itself; the validity of the acquisition is not questioned. Rather, at issue is the termination of Daewoo America's car supply, and GM's role and intention in bringing about that termination. Put another way, it is the goal of the acquisition that is at issue, with Daewoo America insisting that GM purchased the Daewoo Korea assets specifically to cause it economic harm. The acquisition is merely the vehicle by which GM fulfilled its tortious purpose.

The Third Claim is that GM tortiously interfered with Daewoo America's "Prospective Economic Advantage," which is described as the expected expansion of Daewoo America's distribution and servicing network. Again, Daewoo America focuses on GM's statements-in particular, GM's request that Daewoo America cease entering into new dealership agreements. Daewoo America in effect claims that GM promised to assume Daewoo Korea's performance of the Distribution Agreement and that it relied on the promise and complied with GM's request. In Daewoo America's view, GM's promise caused it to forego the expansion of its dealership

network and, resultantly, to forego the profit it would have realized through that network expansion.

Daewoo America's Fifth Claim is that the all of the defendants violated California's Cartwright Act,[13] an antitrust statute; they "conspired, combined, and entered [into] agreements to limit or reduce production, or increase the price, or prevent" Daewoo America from competing in the distribution and sale of Daewoos. Although Daewoo America acknowledges that the "Master Transaction Agreement operates to eliminate competition," and that the agreement supplants its distribution rights, it focuses more on what the defendants did after they began to import Daewoos for sale in the United States. The defendants have cut off its supply of cars, and have been distributing the cars Daewoo America believes it should be distributing. Daewoo America attacks not the MTA, but the defendants' use of the assets the MTA provided. In other words, Daewoo America believes that the defendants have used these assets for an illegal, anticompetitive purpose, whether those assets were acquired validly or not.

The Sixth Claim, Unfair Competition under California law, is a "catch-all" cause of action, which incorporates the First through the Fifth claims and all of the defendants' conduct described in the Amended Complaint.[14] Daewoo America

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[13] Cal. Bus. & Prof.Code § 16720 *et seq.*

[14] Daewoo America cites Cal. Bus. & Prof.Code § 17200 *et seq.* as the basis for its unfair competition claim. Unfair competition under this section includes "any unlawful, unfair or fraudulent business act or practice." *Gregory v. Albertson's, Inc.*, 128 Cal. Rptr. 2d 389, 392 (Cal. Ct. App 2002) (internal quotation marks omitted). A business act is "unlawful" if it is forbidden by law. *Walker v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 2d 79, 86 (Cal. Ct. App. 2002). An act is "unfair" if it is "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the

alleges that the defendants have caused its business to be "substantially impaired or destroyed" and that it has "no adequate remedy at law" for its injuries. As indicated above, Daewoo America finds fault in much of the defendants' conduct, most of which was not material to the issues litigated in the Korean bankruptcy.

Daewoo America's Seventh Claim, Successor Liability against GMDAT, is that Daewoo Korea executed the sale of its assets "for the fraudulent purpose of escaping [its] debts and liabilities to [Daewoo America]." Among those unpaid debts and liabilities was Daewoo Korea's obligation under the Distribution Agreement to supply Daewoo America with cars for sale and distribution in the United States. Because GMDAT ran Daewoo Korea's automotive manufacturing business both before and after the acquisition, received Daewoo Korea's assets, and continued to employ many of Daewoo Korea's workers, GMDAT is Daewoo Korea's successor-in-interest. As such, "GMDAT is liable . . . to the same extent as Daewoo Korea." Though obvious, it is worth emphasizing that this claim is directed at GMDAT, not Daewoo Korea. Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale, this Seventh Claim is simply seeking to enforce the bankruptcy court's order.[15]

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law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999). "In effect, the UCL [California's Unfair Competition Law] borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." *Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368, 375 (Cal. Ct. App. 1999).

[15] While Daewoo America does claim that Daewoo Korea acted fraudulently during the asset sale process, this is basically immaterial to its claim. Daewoo America is not trying to upset the bankruptcy order. Rather, it believes GMDAT has an obligation to Daewoo America that survives bankruptcy and is attempting to enforce it.

The Eleventh Claim, Constructive Termination of the Distribution Agreement under Florida law,[16] is that GM's acquisition of the Daewoo Korea Plants and the defendants' sale in the United States of the vehicles manufactured at those plants operated to terminate the Distribution Agreement and Daewoo America's agreements with its Florida automotive dealers. Like the Second and Fifth Claims, this claim rests on what happened after GM and its partners purchased the Daewoo Korea Plants, and not on the invalidity of the acquisition itself. Again, Daewoo America focuses on the "rebadging" of Daewoos manufactured in the Daewoo Korea Plants, which the defendants market and sell in the United States, and the termination of its supply of cars for sale and distribution in the same geographic market. The validity of the asset sale has no bearing on the legal sufficiency of this claim.

The Twelfth and Thirteenth claims are statutory, Illegal Conduct Related to a Motor Vehicle Business under Florida law,[17] and Constructive Termination of the Distribution

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[16] Daewoo America failed to specify the statutory subsection that formed the basis for this claim. It nevertheless appears that Daewoo America based this claim on Fla. Stat. § 320.641(1)(b)(3), which proscribes the "unfair" termination of a franchise agreement. Such termination is unfair if "it is not clearly permitted by the franchise agreement; is not undertaken in good faith; is not undertaken for good cause; or is based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach; or if the grounds [for termination] have not been applied in a uniform and consistent manner by the licensee."

[17] Fla. Stat. § 320.64(4) permits the revocation of a motor vehicle dealer's license to operate in the state if that dealer "has indulged in any illegal act relating to his or her business" with such frequency as to establish a pattern of wrongdoing. This subsection also allows any motor vehicle dealer harmed by another's violation of the subsection to seek legal and equitable remedies against the offender. *See* Fla. Stat. §§ 320.695, 320.697.

Agreement Against GM under Massachusetts law.[18] GM's overall conduct caused Daewoo America to suffer a pecuniary loss or other adverse affect in carrying out its business. As is the case with the Sixth Claim, Daewoo America supports these claims by referring to conduct completely separate from that involved in the Korean bankruptcy court's proceedings.

The Fourteenth Claim, Constructive Termination of the Distribution Agreement,[19] is directed against all of the defendants and is substantially similar to the Second Claim. It alleges that the defendants, by refusing to supply Daewoo America with the cars manufactured in the Daewoo Korea Plants, and by selling and distributing those cars in the United States themselves, have effectively terminated both the Distribution Agreement and Daewoo America's agreements with its dealers. Like the Second Claim, Daewoo America puts the defendants' intent in issue; they purchased the Daewoo Korea Plants for the purpose of terminating Daewoo America's agreements with malice or in bad faith.

Daewoo America's factual allegations can be separated into two categories. The first consists of the defendants' "promise" that Daewoo America would have a role in the post-transfer, post-Daewoo Korea period; it would distribute the

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[18] Daewoo America cites Mass. Gen. Laws ch. 93B, § 4(c)(12) as the basis for its Thirteenth Claim. This provision makes it illegal for vehicle manufacturers, distributors and franchisors "to act to accomplish, either directly or indirectly through any parent company, subsidiary, or agent, what would otherwise be prohibited under this chapter on the part of the manufacturer or distributor."

[19] Daewoo America cites Mass. Gen. Laws ch. 93B, § 5 as the basis for this claim. It is illegal under this statute for a manufacturer, distributor or franchisor to, among other things, terminate or refuse to renew a motor vehicle dealer franchise agreement "without good cause, in bad faith, or in an arbitrary or unconscionable manner." *Id.* § 5(a).

cars manufactured at the Daewoo Korea Plants. Daewoo America relied on this promise. The promise went for naught, however, when GM and Suzuki agreed that the cars produced at those plants would be rebadged and distributed by Suzuki. The second category assumes that the defendants eliminated Daewoo America's vehicle supply for anticompetitive purposes, led Daewoo Korea to shirk its delivery responsibilities under the Distribution Agreement, and refused to take on those delivery responsibilities in Daewoo Korea's stead. Claims Six, Thirteen, and Fourteen assert conduct falling under both categories.

The district court's order provides no explanation as to how the validity of the MTA, the Korean bankruptcy court's orders, or the Korean bankruptcy proceedings might have any impact on these claims. Indeed, such validity is irrelevant to the question of whether GM's promise to make Daewoo America its United States distributor was intentionally untruthful. Likewise, such invalidity is irrelevant to the question of whether the defendants eliminated Daewoo America's vehicle supply with tortious or anticompetitive intent. Moreover, as I have explained, Daewoo America's Seventh Claim, the Successor Liability claim against GMDAT, is entirely dependent on the validity of the Korean bankruptcy proceedings; Daewoo America cannot recover against GMDAT as Daewoo Korea's successor if the transaction by which GMDAT gained that position is voided. In sum, I cannot agree with the court that addressing these claims would necessitate the review, and perhaps invalidation, of one or more of the decisions of the Korean bankruptcy court. According to that court's decisions, international comity simply ignores claims that are entirely foreign to that court's proceedings and jurisdiction. These claims should be dismissed on the ground that they are legally insufficient, not because international comity forecloses their consideration.

B.

Unlike the claims discussed above, the Fourth, Eighth, Ninth and Tenth Claims, by their nature, call the Korean bankruptcy court's orders and proceedings into question. The Fourth Claim, Aiding and Abetting Breach of Fiduciary Duty, is that Daewoo Korea, as Daewoo America's controlling shareholder, had a fiduciary duty to preserve and maximize Daewoo America's assets and to prevent the subsidiary's insolvency – for the benefit of both Daewoo America and its creditors. These assets, according to Daewoo America, included its right under the Distribution Agreement to receive cars from the Daewoo Korea Plants and to sell and distribute them in the United States. GM was aware of Daewoo Korea's fiduciary duty, but through the MTA and other agreements, provided Daewoo Korea with "substantial assistance" in breaching that duty. To grant Daewoo America relief on this claim, the court would have to find that the asset transfer itself was a tortious act, constituting a breach of Daewoo Korea's fiduciary responsibilities.

The Eighth Claim, Unauthorized Post-Petition Transfer, is brought against all of the defendants.[20] The claim is that Daewoo America's property, namely Daewoo America's exclusive right to sell and distribute Daewoo automobiles in the United States, was unlawfully transferred to the defendants after

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[20] 11 U.S.C. § 549 states, in relevant part:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate –
>
> (1) that occurs after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

11 U.S.C. § 549.

Daewoo America filed for bankruptcy relief in the California bankruptcy court. Similarly, the Ninth and Tenth Claims, Violation of the Automatic Stay (against all defendants and GM, respectively), assert that Daewoo America's exclusive distribution rights were given away when the automatic stay specifically forbade "any acts to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

In each of these four claims, Daewoo America points to the asset transfer itself as the illicit conduct. It cites no additional conduct in support of these claims. The Korean bankruptcy court approved the MTA and incorporated it into Daewoo Korea's reorganization plan. Thus, Daewoo America cannot attack the MTA without also attacking the Bankruptcy court's approval of it; the two are inextricably intertwined. With respect to these claims, I therefore agree with the court that they amount to nothing more than a collateral attack on the Korean bankruptcy court's orders. Indeed, in contending that it has "no adequate remedy at law" for the harm the asset transfer has caused and asking that "the unauthorized post-petition transfer be set aside," Daewoo America reveals that the objective of these claims is the unwinding of the asset transfer.

I am satisfied that international comity is an appropriate basis for disposing of these four claims. Given the manner in which Daewoo America has pleaded them, the district court would have no choice but to reevaluate the decisions by the Korean bankruptcy court. As the court aptly states, "granting the relief sought would require the [district] court to set aside the asset transfer to the defendants, which was approved by the Korean court." *Ante* at [16a]. Such a collateral attack should not be entertained, and the district court's abstaining from deciding the merits of these claims in no measure constituted an abuse of discretion.

III.

I turn now to what I consider is the appropriate manner in which to address the remaining issues presented by this appeal. When deciding whether a plaintiff's claims should be dismissed, we must view the complaint in the light most favorable to the plaintiff and accept the well-pleaded facts as true. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.,* 795 F.2d 948, 953 (11th Cir. 1986). A court "may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall County Bd. of Educ. v. Marshall County Gas Dist.,* 992 F.2d 1171, 1174 (11th Cir. 1993) (citing *Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1539 (11th Cir. 1991)).

The claims in this case can be grouped into three core theories of recovery,[21] each of which turns on Daewoo America's interpretation of the Distribution Agreement. In the first group, Daewoo America's theme is that GM, in purchasing the Daewoo Korea Plants, and the defendants, in subsequently distributing and selling vehicles and parts manufactured by those plants, misappropriated Daewoo America's distribution rights granted by the Distribution Agreement. I label this the "Conversion Theory." In the second group, Daewoo America asserts that the Distribution Agreement guaranteed it a continuous supply of vehicles and parts, even after GM and its

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[21] As I indicated in the previous section, Daewoo America's Sixth Claim (Unfair Competition), Twelfth Claim (Illegal Conduct Related to Motor Vehicle Business), and Thirteenth Claim (Constructive Termination of the Distribution Agreement) are, for the most part, derivative claims, for which the other illegal conduct alleged in the Amended Complaint will sustain a cause of action. These claims are legally insufficient because Daewoo America's other claims are legally insufficient.

partners purchased the Daewoo Korea Plants. I label this the "Continuous Supply Theory." In the third group, Daewoo America's theme is that it had the right to stop (or at the very least, to challenge) Daewoo Korea's sale of the Daewoo Korea Plants to GM and its partners, but gave up that right based on GM's promises. I call this the "Fraud Theory." Because I agree that international comity adequately resolves the "Conversion Theory" claims (the Fourth, Eight, Ninth, and Tenth claims of the Amended Complaint), I do not address their merits. I analyze the remaining theories in turn.

A.

The Second, Third, Fifth, Seventh, Eleventh, and Fourteenth claims rely on the Continuous Supply Theory. Daewoo America contends that the Distribution Agreement entitles it to receive and distribute vehicles from the Daewoo Korea Plants until at least 2009. From its perspective, Daewoo America still has the right to receive and distribute vehicles made in the Daewoo Korea Plants, despite the fact that Daewoo Korea no longer makes Daewoos for sale in the United States. Indeed, Daewoo America acknowledges that its distribution rights are not affected by the distribution and sale of just "*any* vehicle that happens to be manufactured by GMDAT or branded Chevrolet or Suzuki," only those manufactured in the Daewoo Korea Plants. Reply Brief of Appellant at 6-7 (emphasis in original) (internal quotations omitted). Moreover, when the defendants distribute those vehicles under the Chevrolet and Suzuki brands, Daewoo America insists that its right to delivery of vehicles is further denied.

The Second Claim, Tortious Interference with Contract, paints the asset transfer as disruptive of the Distribution Agreement, under which Daewoo Korea had an obligation to provide Daewoo America with vehicles. The acquisition of the Daewoo Korea Plants caused Daewoo Korea to be unable to

deliver cars to Daewoo America. Am. Compl. ¶ 76. This inability, in turn, interfered with Daewoo America's dealership agreements, under which the vehicles were distributed in the United States. *Id.* The assumption underlying this claim is that Daewoo Korea's inability to provide Daewoo America with cars, breaches the terms of the Distribution Agreement.

The Third Claim accuses GM of tortiously interfering with Daewoo America's prospective economic advantage, "through its fraudulent misrepresentations and omissions." Am. Compl. ¶ 84. GM's purported misrepresentations aside, the prospective opportunities Daewoo America claims to have lost exist only if it had a right to be supplied with vehicles after Daewoo Korea's reorganization and asset sale. In other words, absent the right to a supply of vehicles on which to build its distribution and service network, Daewoo America has no prospective business opportunities to be injured.

Daewoo America's Fifth Claim asserts that the defendants violated California's Cartwright Act, which prohibits agreements among individuals or companies that restrain or eliminate trade. *See Lowell v. Mother's Cake & Cookie Co.*, 144 Cal. Rptr. 664, 671 (Cal. Ct. App. 1978). According to Daewoo America, the defendants conspired to eliminate competition in the United States Daewoo distribution market[22] by executing the MTA (*i.e.*, taking control of the exclusive means of Daewoo parts and vehicle production), and by

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[22] I assume that the United States Daewoo distribution market is a valid relevant market for the purpose of sustaining a Cartwright Act claim. *See Exxon Corp. v. Superior Court*, 60 Cal. Rptr. 2d 195, 201 (Cal. Ct. App. 1997) ("Ordinarily, a plaintiff [attempting to show a significant and unreasonable restraint on trade under the Cartwright Act] must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." (citation omitted) (internal quotation marks omitted)).

depriving it of Daewoo vehicles. Am. Compl. ¶ 100.[23] This deprivation of vehicles presumably harmed Daewoo America and its consumers by freeing defendants to "prevent competition, limit or reduce production, or increase prices." Am. Compl. ¶ 106. Daewoo America posits that, by operation of law, it has the right to compete in the relevant market, which requires the defendants to supply it with vehicles.

The Seventh Claim, Successor Liability, attempts to place GMDAT in Daewoo Korea's shoes, making GMDAT responsible for Daewoo Korea's alleged breach of the Distribution Agreement. Again, Daewoo America focuses on the loss of its vehicle supply, stating that Daewoo Korea's asset transfer to GMDAT was an attempt to escape its "debts and liabilities to [Daewoo America] . . . leaving [Daewoo America] with an insolvent shell with no Daewoo vehicles or parts to distribute." Am. Compl. ¶ 122. GMDAT can only be responsible for the supposed "debts and liabilities" if Daewoo Korea's obligation to deliver cars to Daewoo America did not terminate with the transfer of its assets to GMDAT.

The Eleventh and Fourteenth Claims allege that Daewoo America has been unable to obtain vehicles to distribute because GM excluded it from the assets it acquired via the MTA. Am. Compl. ¶ 145, 163. According to Daewoo America, its inability to obtain Daewoo automobiles, coupled with the defendants' subsequent sale and distribution of "rebadged" Daewoos, constructively terminated the Distribution Agreement and Daewoo America's franchise agreements with its dealer network. This is only problematic, of course, if GM has some obligation to assist Daewoo America to perform its contracts.

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[23] To the extent Daewoo America challenges the *purchase* of the assets as anticompetitive, this is a claim that should have been raised during the course of the Korean bankruptcy proceeding. I interpret the claim, however, to be a challenge to defendant's refusal to deal with Daewoo America once the assets had been purchased.

Finally, in the Thirteenth Claim, Constructive Termination of the Distribution Agreement, Daewoo America contends that GM's conduct, as described throughout the Amended Complaint, terminated the Distribution Agreement and its ability to receive and distribute Daewoo vehicles. "GM's illegal conduct caused [Daewoo America] to suffer pecuniary loss or to be otherwise adversely affected, by virtue of the fact that [its] distribution agreement was discontinued, cancelled, not renewed, modified or replaced." Cutting off its supply of Daewoo automobiles may have injured Daewoo America, but it is only tortious if Daewoo America had a right not to be injured. Stated differently, unless GM's decision to exclude Daewoo America from the United States Daewoo distribution network denied Daewoo America a right it had to be part of that network, GM's conduct was not tortious.

Daewoo America's right to receive Daewoo vehicles from Daewoo Korea and distribute them in the United States was created by the Distribution Agreement. Accordingly, that agreement is the only basis on which Daewoo America can legitimately claim it has any right to a continuing supply of vehicles.[24]

In Daewoo America's view, "[n]othing in the contract supports . . . a reading" that it "had the exclusive U.S. distribution rights to a vehicle model *only* so long as that model was manufactured by [Daewoo Korea]." Brief of Appellant at 31-32. Daewoo America observes that "the Distribution Agreement conferred on [it], for ten years, the rights not only (1) to serve as the United States distributor of the Covered

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[24] Daewoo America's Cartwright Act claim relies on the presumption that GM (or GMDAT) had a statutory obligation to use Daewoo America as a distribution channel. Anything else would be an unreasonable restraint on trade. I simply disagree.

products;[25] and (2) to do so exclusively, but also (3) to receive a supply of the Covered products needed to carry out its role as the exclusive U.S. distributor." *Id.* at 31. Daewoo America also rightly points out that "the Distribution Agreement broadly prohibited [Daewoo Korea] from permitting third parties to sell the Covered products in the United States or otherwise circumventing [Daewoo America]'s exclusive distribution rights." *Id.* at 32-33.

That the Distribution Agreement contains these rights and obligations is not disputed by the defendants. This, however, is not the question. Rather, the question is whether Daewoo Korea either promised not to sell the Daewoo Korea Plants if the prospective buyer refused to assume its responsibilities under the Distribution Agreement or, alternatively, whether Daewoo Korea guaranteed that Daewoo America would be provided with vehicles and parts regardless of who owned the Daewoo Korea Plants. The answer rests on the definition of two key terms in the Distribution Agreement: "Seller" and "Product."

The plain language of the Distribution Agreement designates Daewoo Korea as the "Seller" of "Products," and Daewoo America as the "Buyer" and exclusive United States distributor of those Products. The term "Seller" refers solely to Daewoo Korea; it makes neither specific nor general reference to any other entity of any kind. Daewoo America argues that its rights cannot be limited solely to "Seller's" Products because "[t]he Distribution Agreement does not state that [Daewoo America] will have exclusive U.S. distribution rights 'so long as the Products are manufactured by [Daewoo Korea]' or 'so long as the Products bear the "Daewoo" trademark.' " *Id.* at 32. This

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[25] The term "Covered products" is one of Daewoo America's own creation, and is intended to denote any vehicles manufactured in the Daewoo Korea Plants over which Daewoo America claims distribution rights. The term appears nowhere in the Distribution Agreement.

argument is belied by the language of the agreement: "Seller is the exclusive worldwide distributor of the Products (as defined in Section 1), *which are manufactured by Seller*." Doc. 144, Ex. 7 (emphasis added). Daewoo America essentially argues that Daewoo Korea intended to impart distribution rights to vehicles not mentioned in the Distribution Agreement, which Daewoo Korea did not manufacture, and over which Daewoo Korea exercised no control, simply because the Distribution Agreement does not state otherwise. This assertion is nothing if not incredible.

The Distribution Agreement defines the term "Products" as "the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor vehicle models) and the parts, accessories and equipment therefor." Although the parties neglected to attach Exhibit A to the Distribution Agreement, nothing in this definition or the remainder of the Distribution Agreement suggests that the Products will be provided by anyone other than the Seller (namely, Daewoo Korea). It is to these Products that Daewoo America's exclusive distribution rights attach, and no others; the agreement does not address other brands or types of vehicles, nor does it make reference to other manufacturers.

In sum, the plain language of the Distribution Agreement contains no guarantee that Daewoo America would continue to receive Products after Daewoo Korea ceased manufacturing them, nor does the agreement restrict Daewoo Korea's ability to sell its manufacturing assets. Again, Daewoo Korea's assets are not mentioned in the agreement at all. To the extent Daewoo America's claims rely on the existence of such guarantees, they must fail.

B.

According to the First Claim for fraud, GM falsely represented that it would continue the Daewoo distribution

relationship Daewoo America enjoyed with Daewoo Korea. Daewoo America believes that GM made this false promise to "encourage [it] not to take any action that might interfere with GM's acquisition plans." Am. Compl. ¶ 68. To be clear, Daewoo America does not allege that GM specifically offered to engage Daewoo America as the exclusive United States Daewoo distributor in exchange for Daewoo America's acceptance of the MTA or the Modified Plan; such an allegation appears nowhere in the Amended Complaint. Rather, Daewoo America simply claims that it abandoned its right to "oppose the acquisition" in reasonable reliance on GM's supposed misrepresentations.

Analyzing the terms of the Distribution Agreement does not lead to the conclusion that Daewoo America had any right to prevent Daewoo Korea from selling its assets to GM. As already shown, the Distribution Agreement neither expressly nor impliedly provides Daewoo America with any rights respecting the disposition of Daewoo Korea's property. Moreover, Daewoo America has offered no theory, legal or otherwise, on which the court could infer the existence of such a right. As such, Daewoo America cannot prove that GM's alleged misrepresentations caused it any harm. It cannot show that, even if it had opposed the asset sale, the Korean bankruptcy court would have ruled differently.[26] Accordingly, Daewoo America's fraud claim cannot stand.

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[26] Daewoo America's other claimed harms, including its lost opportunity "to cover its positions and/or explore[ ] other business" ventures, Am. Compl. ¶ 69, are simply too vague. *See* Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

IV.

I share the court's view that Daewoo America is simply attempting to return itself to its former position as exclusive United States Daewoo distributor, in complete disregard for the time and substantial effort that the Korean bankruptcy court expended in managing Daewoo Korea's reorganization. Nevertheless, it is patently clear that the court, like the district court, rushed into abstention, dismissing Daewoo America's Amended Complaint in its entirety when, in fact, the international comity doctrine has only limited application. I believe such judicial expediency to be unnecessary, especially considering that "[f]ederal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them." *Turner Entm't Co. v. Degeto Film GmbH,* 25 F.3d 1512, 1518 (11th Cir. 1994) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976)). I would therefore analyze the claims presented by Daewoo America and, because they lack substance, dismiss them.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:04-cv-201-Orl-31KRS

DAEWOO MOTOR AMERICA, INC.,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,
GM DAEWOO AUTO TECHNOLOGY CO.,

Defendants.

ORDER

This cause comes for the Court's consideration on the following:

1) General Motors Corp.'s ("GM") Motion to Dismiss (Doc. 73), Memorandum in Support thereof (Doc. 121); GM Daewoo Auto & Technology Co.'s ("GMDAT") Supplemental Memorandum (Doc. 127); and American Suzuki Motor Corp.'s ("American Suzuki") Supplemental Memorandum (Doc. 129). In addition, Daewoo Motor America ("DMA") filed a Response (Doc. 138) and Supplemental Brief (Doc. 139), and GM filed a Reply (Doc. 147). GMDAT also filed a Response (Doc. 149).

2) Suzuki Motor Corp.'s ("Suzuki") Motion to Dismiss (Doc. 136) and Memorandum in Support thereof (Doc. 137),

and DMA's Response thereto (Doc. 140). In addition, DMA filed a Memorandum in Opposition (Doc. 145), and Suzuki filed a Reply (Doc. 150) and Supplemental Brief (Doc. 151).

The Court heard oral argument on August 20, 2004.

I. Background

DMA was incorporated in Delaware[1] on June 30, 1997, as a wholly owned subsidiary of Daewoo Motor Co., Ltd. ("DWMC"), a South Korean automobile manufacturer. DMA served as the exclusive distributor of Daewoo automobiles in the United States, and provided exclusive warranty services and replacement parts to U.S. Daewoo dealers.[2]

On November 18, 1999, DMA and DWMC entered into an Automobile Purchase and Distribution Agreement ("the Distribution Agreement").[3] Under this Agreement, DWMC (the "Seller") agreed to sell to DMA (the "Buyer") certain "Products," and granted to DMA "the exclusive right to distribute, sell, rent, lease and otherwise dispose of and service,

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[1] DMA's principal place of business is in California.

[2] DMA entered into Dealer Sales and Services Agreements with numerous dealers nationwide. (*See, e.g.*, Doc. 122, Ex. 3).

[3] Prior to the execution of the Distribution Agreement, on January 1, 1998, DMA entered into a Trademark License Agreement ("Trademark Agreement") with DWMC's predecessor in interest. (Doc. 144, Ex. 10). The Trademark Agreement was executed in conjunction with an Original Distribution Agreement that was superceded by the Distribution Agreement. Under the Trademark Agreement, DWMC granted to DMA the non-exclusive right to use the Daewoo trademark in the United States in connection with the sale of Daewoo vehicles and parts. Also on January 1, 1998, DWMC's predecessor in interest entered into a Supply Commitment Agreement ("Supply Agreement") with PPM Finance, Inc. ("PPM"), its principal lender. (Doc. 144, Ex. 9).

directly or through one or more subsidiaries or independent contractors, the Products in the United States and all territories and possessions thereof." (Doc. 144, Ex. 7) (parenthetical information omitted).[4] The Agreement further provided:

> Whereas, Seller is the exclusive worldwide distributor of the Products (as defined in Section 1), which are manufactured by Seller;
>
> Whereas, Seller, as exclusive worldwide distributor has the right to grant to others the exclusive right to sell the products in certain regions, including the Territory (as defined in Section 2);
>
> Whereas, Buyer is the wholly owned subsidiary of Seller;
>
> . . .
>
> . . . Seller hereby agrees to sell to Buyer and Buyer hereby agrees to purchase from Seller the Products for resale or for rental or lease in the Territory. For purposes of this Agreement, "Products" shall mean the motor vehicles provided on Exhibit A attached hereto (as said Exhibit A may be amended from time to time by Seller to add or delete motor vehicle models) . . .
>
> . . . Seller shall not Sell or service, directly or indirectly, or permit any other person or corporation, partnership, limited liability company or their entity to Sell or service the Products in the Territory.

The Agreement references "Exhibit A," but the parties agree that no such exhibit ever existed and therefore never was "attached."

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[4] A copy of the Distribution Agreement was attached to the Declaration of current DMA President Yeong Soo Hong (Doc. 144) as Exhibit 7.

In the late 1990s, DWMC began to suffer financial hardship. Thus, on November 10, 2000, DWMC filed for protection in Korea under the Korean Corporate Reorganization Act ("CRA"),[5] and the Korean Court appointed a Receiver.

DWMC notified DMA of its insolvency and plans to file for court receivership. (Doc. 123, Ex. 6). The notification included a summary of Korean bankruptcy law as well as statements indicating that creditors must participate in the reorganization plan to be repaid and that failure to file a claim would result in the loss of that creditor's rights. (*Id.*). DMA in turn notified the U.S. dealers with whom it had Dealer Agreements of DWMC's insolvency.[6] During this initial phase of insolvency, DMA remained the exclusive distributor of Daewoo vehicles in the United States.

In December 2000, DWMC and the Receiver sent to DMA separate reminders to file a claim by January 15, 2001, a deadline established by the Korean Court. (Doc. 123, Ex. 8; Doc. 124, Ex. 9). In January 2001, DMA's then President Dong Jin Lee wrote DWMC to request assistance with claim filing. (Doc. 124, Ex. 10; *see also* Hong Depo.[7] Ex. 5 and at 54-55). With DWMC's aid, DMA retained the law firm Jin & Lee (Doc. 124, Ex 13), and DWMC appointed agents to act on DMA's behalf in the Korean proceedings. DMA did not object to DWMC's appointments (Hong Depo. at 48), and executed a Power of Attorney in favor of Jin & Lee. (Doc. 124, Ex. 10; *see also* Hong Depo. at 56).

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[5] A copy of the CRA was filed as Exhibit 33B to Document 126.

[6] By letter from then DMA President Dong Jin Lee, DMA informed its employees on November 9, 2000, that DWMC was entering into court receivership. (Doc. 123, Ex. 7). DMA touted the move as an "extremely positive step. . . ." (*Id.*).

[7] The Hong Deposition was filed as Documents 133-135.

On January 15, 2001, with the help of Jin & Lee, DMA filed a proof of claim before the Korean Court in the amount of $33 million, and in February 2001, filed a supplemental claim for $45,528,000.00. On February 26, 2001, DWMC's creditors held a meeting at which they reviewed the claims. Jin & Lee attended this meeting on behalf of DMA. The Receiver objected to most of DMA's claims, and the Korean Court therefore sent DMA a Notice of Objection.[8] The Korean Court also informed DMA that it was required to affirm the claims by filing claims against the objector by the end of March. Thus, in preservation of its rights, DMA filed a complaint in the Korean Court against the Receiver and DWMC challenging the objections and seeking approval of its claims. (Doc. 124, Ex. 15). DMA sent a second Power of Attorney to Jin & Lee with regard to the lawsuit. (Doc. 124, Ex. 19). The next month, however, DMA dropped the suit. (Doc. 124, Ex. 20).[9] DMA then filed a second supplemental claim for $1,090,968.00, which the Receiver approved.

At the same time that DWMC entered into receivership, it began acquisition talks with GM. Suzuki allegedly participated in these talks as an "Alliance Partner." (Doc. 153 at 28). On September 20, 2001, DWMC, DWMC's creditors, and GM entered into a non-binding Memorandum of Understanding ("MOU") regarding the sale of certain DWMC assets to GM. The MOU contemplated the formation of a new company that would own and operate select DWMC domestic and foreign assets and businesses. On September 26, 2001, the Korean Court approved the MOU.

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[8] The Receiver objected to all but about $1,344,291.00 of the claims.

[9] Hong testified that DMA filed and withdrew its lawsuit against DWMC based on DWMC's instructions, but Hong also testified that DMA did not object to these instructions, and carried them out willingly. (Hong Depo. at 101-102).

On April 30, 2002, DWMC and certain creditors signed and negotiated in Korea a Master Transaction Agreement ("MTA") with GM.[10] Under the MTA, "Newco A" (later known as GMDAT) would receive the exclusive right to distribute Daewoo vehicles and use the Daewoo trademark worldwide. Further, the MTA provided that assets would not be transferred until the Korean Court approved it and confirmed a reorganization plan that was consistent with its terms.

Days later, DWMC sought to terminate its Distribution Agreement with DMA, alleging material breach due to non-payment of $132 million.[11] On May 6, the Korean Court issued an order approving DWMC's Termination of the Distribution Agreement. (Doc. 143, Ex. 2). The Receiver also sent DMA a letter informing it of the material breach and giving DMA a 30-day cure period. (*See* Doc. 143, Ex. 3).[12]

Around the same time, on May 6, 2002, DWMC creditors held a meeting to approve the Reorganization Plan. By proxy executed by DMA, DWMC employee Han Su Pyon attended the meeting on DMA's behalf, voting in favor of this original Reorganization Plan. (Doc. 143, Ex. 9).

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[10] The final Closing of the Transaction Pursuant to the Master Transaction Agreement occurred on October 17, 2002.

[11] DMA disputes this breach, and claims that, pursuant to the Supply Agreement, DWMC could not terminate the Distribution Agreement until PPM had been paid.

[12] The letter asked DMA to pay the overdue amount, and stated, "Unless such payment is made within 30 days from the receipt hereof, the Distributorship Agreement shall be terminated." (Doc. 143, Ex. 3).

On May 16, 2002, DMA filed for bankruptcy in the Central District of California.[13] The California Bankruptcy Court granted a motion by the Official Committee of Unsecured Creditors of DMA for leave to be appointed to prosecute claims against DWMC. (Doc. 148, Ex. A).[14] In addition, pursuant to 11 U.S.C. § 362(a) and (c), a stay was automatically put in force to prevent any acts against DMA to take possession of or exercise control over DMA's assets.

On September 12, 2002, DWMC filed with the Korean Court a Modified Plan of Reorganization ("Modified Plan" or "Modified Reorganization Plan"), which incorporated the terms of the MTA. The Modified Plan differed from the original plan in that it provided for the sale of certain assets but not for the inclusion of DMA and its network of dealers. On September 30, 2002, DWMC creditors held another meeting to vote on the Modified Plan. Although DMA had notice of this meeting[15] and could have executed another proxy in favor Pyon to vote on DMA's behalf on the Modified Plan (Doc. 126, Ex. 31), no representative of DMA attended the meeting nor voted on the Modified Plan. The Korean Court approved the Modified Plan and the incorporated MTA on September 30. Thereafter,

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[13] DWMC obtained approval from the Korean Court for DMA to file Chapter 11 Bankruptcy in the United States. (*See* Doc. 143, Ex. 1).

[14] Andrew Bloomer filed a Supplemental Affidavit at Document 148.

[15] On September 17, 2002, DWMC sent a letter to creditors informing them of the meeting on September 30, to discuss proposed changes to the Reorganization Plan. (Doc. 125, Ex. 32). In addition, DWMC sent to DMA a letter on September 19, 2002, informing DMA of the September 30 meeting. (Doc. 126, Ex. 31).

GMDAT was formed, and it acquired certain assets from DWMC. (*See* Doc. 123, Ex. 5C).[16]

GM elected to maintain the Daewoo brand name in places like Korea, where it did not have an established dealership network. In the United States, however, GM eliminated the Daewoo brand name but continues to sell the former Daewoo automobiles at U.S. GM dealerships under other brand names, including Suzuki and Chevrolet.

DMA alleges that Defendants' actions have caused the *de facto* termination of the Distribution Agreement, destroyed business opportunities, and caused DMA to fail to meet its contractual obligations with its U.S. dealers. In 2003, DMA sued Defendants in California Bankruptcy Court. Upon transfer by the Multidistrict Litigation Panel, the case now stands before this Court on the two motions to dismiss the First Amended Complaint.[17]

In the First Amended Complaint, DMA alleges against GM the following Counts: (I)[18] Fraud; (II) Tortious Interference with Contract; (III) Tortious Interference with Prospective Economic Advantage; (IV) Aiding and Abetting Breach of Fiduciary Duty; (X) Violation of the Automatic Stay, 11 U.S.C. § 362; (XII) Illegal Conduct Related to Motor Vehicle Business, Florida Statute § 320.64(4); and (XIII) Constructive Termination

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[16] A copy of the Newco A Asset Transfer and Liability Assumption Agreement ("ATA") was filed as Exhibit 5C to Document 123.

[17] Judge Sheri Bluebond of the California Bankruptcy Court dismissed several claims of the original complaint and allowed DMA to file an amended complaint. The First Amended Complaint was filed herein at Document 153.

[18] The Roman numerals correspond with the Count numbers in the First Amended Complaint.

of Distribution Agreement, Mass. Stat. 93B § 4(c)(12). Against all Defendants, DMA alleges: (V) Violation of the Cartwright Act, Cal. Bus. & Prof. Code § 16720 et seq.; (VI) Unfair Competition, Cal. Bus. & Prof.Code § 17200; (VIII) Unauthorized Post-Petition Transfer, 11 U.S.C. § 549; (XI) Constructive Termination of Distribution/Franchise Agreements, Florida Statute § 320.641; and (XIV) Constructive Termination of Distribution Agreement, Mass. Stat. 93B § 5. Finally, DMA alleges against GMDAT (VII) Successor Liability.

II. Standard of Review and Analysis

A. Validity of Korean Court's Orders

Defendants seek to dismiss all claims based on principles of comity. The comity doctrine applies only to "valid" orders of a foreign court. DMA challenges the validity of certain Korean Court orders, and hence this Court will begin its analysis here.

Specifically, DMA contends that the Korean Court's orders regarding the Modified Reorganization Plan and the MTA, which were issued after May 16, 2002 (the date on which DMA filed for bankruptcy), affected DMA's property rights under the Distribution Agreement[19] and are therefore void for taking action against the property of the debtor's estate in violation of the automatic stay under 11 U.S.C. § 362. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992) (actions taken in violation of

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[19] DMA asserts that, pursuant to the MTA and Modified Reorganization Plan, DWMC conveyed to GM the exclusive right to use the Daewoo brand and trademark, and that the MTA and Modified Plan empowered third parties to distribute former Daewoo products in the United States in violation of its exclusive rights under the Distribution Agreement.

automatic stay are void);[20] *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982) (same). DMA further asserts that Defendants' actions of rebadging Daewoos and selling them in the United States under Chevrolet and Suzuki brand names constitute acts to obtain possession of, or exercise control over, property of the DMA estate.

Under § 362(a), upon commencement of a bankruptcy case in the United States, an injunction is automatically and immediately imposed, and said injunction stays all actions against a debtor and all acts that affect possession or control over property of the debtor's estate.[21] 11 U.S.C. § 362(a); *see In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631, 637 (3d Cir. 1998). While the Court agrees with DMA that the protections of § 362(a) apply extraterritorially, *see In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998),[22] *Underwood v. Hilliard (In*

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[20] Because this case has foreign relations implications and involves federal bankruptcy matters, federal law applies. To the extent it becomes relevant, the law of the Ninth Circuit controls, for the Multidistrict Litigation Panel transferred this case to this Court from California Bankruptcy Court for pre-trial matters.

[21] The property of a bankruptcy estate includes the debtor's legal or equitable interests in property on the date of the commencement of the bankruptcy proceeding. 11 U.S.C. § 541(a)(1).

[22] In Simon, the court assessed whether an injunction issued pursuant to 11 U.S.C. § 524(a)(2), which prohibits collection actions against the estate, had extraterritorial application. The Simon court stated:

> As applied to the concept of in rem bankruptcy jurisdiction, there is no functional difference between the automatic stay imposed by 11 U.S.C. § 362 upon the commencement of a bankruptcy and the injunction prohibiting collection actions against the bankruptcy estate provided in 11 U.S.C. § 524(a)(3). Each stay operates to protect the estate and the *in rem* jurisdiction of the bankruptcy court. Accordingly, we join the

re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996), the salient question herein is not whether the stay extends to property located outside the United States, but rather whether the Korean Court's orders adversely affected any of DMA's property rights under the Distribution Agreement.[23] In this regard, Defendants contend that, pursuant to the Distribution Agreement, DMA had the right to distribute Daewoo products manufactured by DWMC, not GMDAT, and that therefore the rights under the Distribution Agreement differ from the rights transferred under the MTA and the Modified Reorganization Plan. As a result, argue Defendants, the Korean Court's orders approving the MTA and Modified Reorganization Plan did not take action against any property of DMA's estate.

The Court begins by looking to the plain terms of the Distribution Agreement. *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003) ("Under federal law, a written contract must be read as a whole and every part interpreted with

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> Seventh Circuit's logic [in *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 961 (7th Cir. 1996)] and hold that a bankruptcy court may validly exercise its in rem jurisdiction to protect estate property wherever the property is located in issuing a discharge injunction under 11 U.S.C. § 524. Thus, the district court correctly held in this case that the 11 U.S.C. § 524 discharge enjoined [the plaintiff-appellant] from commencing collection against any bankruptcy estate property regardless of its geographic location.

Id. at 996.

[23] Without ruling, the Court assumes for purposes of this Order that the Distribution Agreement was not terminated by DWMC's Notice of Termination filed in the Korean Court and the subsequent running of the 30-day cure period. The Court questions, however, why DWMC would have attempted to terminate the Distribution Agreement if it had no relevance to its corporate reorganization, but that inquiry is not important herein.

reference to the whole, with preference given to reasonable interpretations. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first.") (internal quotations and citations omitted); *Krystal Cadillac*, 142 F.3d at 635 (looking at contract as first step in assessing whether agreement was in effect and thus constituted property of the estate). The Distribution Agreement unambiguously contemplates DWMC as the Seller, and DMA as the Buyer with the exclusive right to distribute certain DWMC "Products."[24] Defendants argue that the Distribution Agreement also unambiguously contemplates that DMA would distribute only those cars manufactured by DWMC and therefore would not extend to cars manufactured by GMDAT.

Regardless of the definition of "Products," the contract contains no language to suggest that DMA has a broad right to sell or distribute any car manufactured by DWMC or its successors. Rather, the terms of the contract suggest only that DMA had the exclusive right to sell or distribute the "Products" of "Seller" (that is, DWMC) and that DMA had the exclusive right to distribute Daewoo vehicles (not Suzuki or Chevrolet vehicles) in the United States.[25] Based on the plain language of

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[24] Although the term "Products" apparently was intended to encompass vehicles and parts manufactured by DWMC, it is not otherwise defined, and as explained supra, Exhibit A was never attached. Whatever this term includes, the contract expressly reserves in DWMC the right to change or delete the "Products" at any time. (*See* Doc. 144, Ex. 7).

[25] Further, the Court takes judicial notice of the complaint filed as an adversary proceeding by DMA in Chapter 11 Case No. 02-24411BB pending before U.S. Bankruptcy Judge Sheri Bluebond. (Doc. 158, Ex. 1). Paragraph 14 of that complaint reads as follows:

Beginning on or about January 1, 1998, the Debtor and DWMC

the Distribution Agreement, the Court finds that DMA does not have property rights to distribute the vehicles currently manufactured by GMDAT[26] and sold in the United States under the Suzuki and Chevrolet brand names.[27] To construe the Distribution Agreement in the manner DMA suggests, the Court would have to find that the Agreement gave DMA the exclusive right in perpetuity to distribute in the United States any and all vehicles made by DWMC or its successors. Nothing in the

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> entered into various agreements whereby DWMC granted the Debtor the exclusive right to purchase Daewoo vehicles and products *manufactured by DWMC* for distribution within the United States. . . .

Id. (emphasis added). The Court also takes notice of a letter sent to GM Counsel Andrew Bloomer by DMA Bankruptcy Attorney Theodore Stolman, in which Stolman wrote, "DMA holds the exclusive rights to distribute *Daewoo* automobiles and parts within the United States and its territories." (Doc. 126, Ex. 34).

[26] Issues of successor liability are discussed below.

[27] Judge Stephen Robinson addressed similar arguments in *Subaru Distributors Corp. v. Subaru of America, Inc. et al.*, Case No. 03-Civ-9608 (SCR) (S.D.N.Y. June 23, 2004). Judge Robinson rejected the contention of Subaru Distribution Corp. ("SBC") – the equivalent of DMA herein – that the distribution agreement and amending memorandum of understanding gave SBC the right to distribute Subarus rebadged as Saabs. In that case, however, the products at issue were expressly defined in the contract whereas in the instant case, the Agreement is effectively silent on the definition of "Products." *See also Volvo Trademark Holding Aktiebolaget v. CLM Equip. Co.*, 236 F. Supp. 2d 536, 553 (W.D.N.C. 2002) (finding, with regard to a breach of contract claim, that the plain language definition of "products" in the dealership agreement clearly referred to accessories manufactured by Champion Road under its own mark, not to any product manufactured by Champion regardless of trademark thereon).

contract suggests such a reading, and indeed such a reading strains credulity.

As set forth in the MTA and as approved in the Modified Reorganization Plan, GM/GMDAT acquired certain manufacturing assets and rights of DWMC's.[28] The property rights under the MTA are wholly different from DMA's contract rights under the Distribution Agreement.[29] Because DMA does not, by virtue of the Distribution Agreement,[30] possess the exclusive right to sell GMDAT-manufactured cars, the Korean Court's orders approving the MTA and Modified Reorganization Plan did not affect any property of DMA's estate and did not violate the automatic stay.[31]

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[28] For a detailed list of DWMC assets acquired by GMDAT, *see* the ATA. (Doc. 123, Ex. 5C).

[29] As noted previously, the Distribution Agreement was not assigned to GMDAT. Rather, DWMC sought to terminate it.

[30] To the extent DMA argues that it also possesses exclusive rights under the Trademark Agreement when read in conjunction with the Distribution Agreement and Supply Agreement, the Court finds that the argument fails. The Trademark Agreement expressly states it is a non-exclusive license, and this Court will not alter the unambiguous terms of that contract.

[31] This ruling comports with Judge Bluebond's "Tentative Ruling" of July 30, 2003. In that ruling, she stated:

> The Distribution Agreement did not give the debtor a right to distribute in the United States any vehicles ever manufactured at any plant then owned by the Korean parent, regardless of who owns the facility or who does the manufacturing. The Korean parent had the right to stop producing Daewoo vehicles without breaching the contract. The Korean parent also had the right to sell some or all of its assets to a third party who wasn't bound by the distribution agreement. (Moreover, it is not clear that the proposed conduct would violate the distribution agreement even

Having found that the Korean Court's orders did not violate the automatic stay, the Court now turns to the broader question of comity.

C. Comity

Hilton v. Guyot, 159 U.S. 113 (1895), set forth the general principle of comity as this:

> where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Id. at 158. Comity is discretionary; it is not a rule of law, but a rule of practice, convenience, and expediency. *Id.* at 163-64 ("Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its

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if GMDAT were bound by it.).

(Doc. 126, Ex. 36).

laws."); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004); *Remington Rand Corp.-Del. v. Bus. Sys. Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). Generally, a court should evaluate: "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just." *Ungaro-Benages*, 379 F.3d 1227, 1238-39 (internal citations omitted).

Analyzing whether comity applies to a foreign judgment[32] bears similarity to analyzing whether res judicata applies to a domestic judgment. *International Trans., Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003). "Essentially, once the parties have had an opportunity to present their cases fully and fairly before a court of competent jurisdiction, the results of the litigation process should be final." *Id.* (citations omitted).

In the bankruptcy context, the doctrine is especially applicable, for comity enables a debtor's assets to be dispersed equitably and systematically rather than haphazardly or erratically. *Id.* at 593-94; *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1149 (5th Cir. 1990). In this case, GM claims that: 1) the Korean proceedings occurred before a court of competent jurisdiction; 2) DMA had actual notice of and participated in those proceedings; 3) DMA consented to the reorganization plan and asset transfer; 4) the Korean Court procedures are consistent with U.S. bankruptcy law principles; 5) recognition of the Korean proceedings and orders promotes the orderly distribution of assets and resolution of claims related

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[32] To grant comity, a judicial act need not be a final judgment. *Remington*, 830 F.2d at 1266.

to the insolvent company; and 6) DMA's claims amount to an improper collateral attack on the MTA and Modified Reorganization Plan. The Court will address these arguments below.

1. Due Process Concerns

a. Similarity of Korean and U.S. Bankruptcy Laws

In looking to the laws of Korea to ensure they comport with U.S. notions of fairness and due process, such as notice and an opportunity to be heard, the Korean laws need not be identical to the laws of the United States. *International Trans.*, 347 F.3d at 594 (internal citations omitted); *In re International Admin. Servs.*, 211 B.R. 88, 96 (M.D. Fla. 1997) (finding similar though not identical laws of Guernsey provided sufficient procedural safeguards to protect the party's interests). The Court finds that the bankruptcy laws of Korea are substantially similar to the laws of the United States and comport with general notions of due process. *See, e.g. Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999- 1000 (2d Cir. 1993) (rejecting plaintiff's argument that, because Australian bankruptcy law did not provide for an automatic stay,[33] the court should not grant comity, and holding that such minor procedural differences were insufficient to demonstrate prejudice for having to maintain an action in Australia); *In re Kyu-Byung Hwang*, 309 B.R. 842, 846 (Bankr. S.D.N.Y. 2004) (holding that Korean Bankruptcy law, and in particular the CRA, was "substantially similar" to U.S. law and did not discriminate against non-Korean creditors or

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[33] Korean law also does not provide for an automatic stay.

offend U.S. notions of due process).[34] On this subject, there is no serious debate.

b. Control by DWMC

Whether DMA actually enjoyed due process is, however, hotly contested. Defendants contend that DMA enjoyed full participation in and had full notice and opportunity to be heard in the Korean Court insolvency proceedings. DMA alleges that, from the start of the insolvency process until the date it filed for bankruptcy in the United States, it was controlled by DWMC[35] and therefore did not fully and independently participate. The Court rejects DMA's argument, for the record reveals that, despite being a wholly owned subsidiary, DMA had the ability to control its actions throughout DWMC's reorganization, and in fact did exercise significant control. For example, DMA asked DWMC for help in hiring counsel, and DMA in fact retained the law firm of Jin & Lee. DMA executed Powers of Attorney in favor of Jin & Lee, and participated in the

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[34] It is noteworthy, however, that the *Kyu-Byung Hwang* court did not consider reciprocity, as this Court does below. This is likely so because the Second Circuit rejects reciprocity as a factor in the comity analysis. The *Kyu-Byung Hwang* case is helpful to the extent it recognizes Korean insolvency law as generally comporting with U.S. notions of fairness and due process.

[35] DMA alleges in its First Amended Complaint that it was controlled by DWMC until October 16, 2003, (*see, e.g.*, Doc. 153 at 7), but in its papers and depositions filed with the Court, DMA suggests that DWMC ceased control over DMA on May 16, 2002, the date on which DMA declared bankruptcy. (*See, e.g.*, Doc. 138 at 8).

preparation of its claims submitted to the Korean Court[36] as well as the filing and withdrawal of the lawsuit against DWMC.

As is evident, DMA actively sought and obtained independent representation and took steps to preserve its rights throughout the reorganization. DMA cannot now claim that its status as a wholly owned subsidiary rendered it an unrepresented puppet in DWMC's insolvency process.[37] *Cf. International Trans.*, 347 F.3d at 595 (holding that the plaintiff would be bound by notices sent to its agent and that its obligation to act in preservation of its own rights did not cease upon the filing of a claim by its agent).

c. Notice and Participation

DMA also contends it did not receive full notice and did not vote on the Modified Reorganization Plan and therefore did not enjoy full participation. The Court again rejects DMA's argument. The record demonstrates that DMA had notice of all key events from the start of the insolvency until its closing, as well as the opportunity to be heard on all matters, including the Modified Plan. Indeed, DMA knew about the September 30 creditors' meeting at which the Modified Reorganization Plan was to be put to a vote, but voluntarily chose not to attend by

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[36] Hong testified that he prepared the first claim for DMA and submitted it to DWMC. He also testified that Jin & Lee prepared the supplemental claims with information provided by Hong. (*See* Hong Depo. at 42, 45). In addition, then DMA President Lee sent to DWMC the second supplemental claim with the understanding that it would be filed with the Korean Court. (*Id.* at 52).

[37] Corporate conglomerates often have interlocking directors. Plaintiff's argument would have this Court assume that the DMA Board of Directors and its management violated their fiduciary duties to DMA. This Court is not willing to make this assumption.

proxy[38] or otherwise.[39] Because DMA had notice of the Modified Plan, failed to vote on it, and chose not to object to it, DMA effectively consented to the Modified Plan. *See FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285 (7th Cir. 2002) (suggesting that, where a party has notice, failure to object "counts" as consent).

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[38] In-house DMA counsel Agnes Cha wrote to DMA Bankruptcy Attorney Stolman on September 3, 2002, stating in relevant part: "Attached is proposed Proxy for voting and acceptance to consent confirmation of proposed modification to DWMC's reorganization plan and cover memo from Korea requesting us to execute the Proxy." (Doc. 126, Ex. 34).

[39] In his Declaration (Doc. 126, Ex. 34), Stolman stated:

> On or about September 23, 2002, Lee & Ko . . .a law firm in South Korea that has been retained by the Debtor [DMA] with respect to the insolvency proceeding of [DWMC], advised me that, in light of an upcoming meeting of [DWMC's] creditors to approve [the] revised plan of reorganization, the Debtor should file its claim in [the Korean] insolvency proceeding immediately.

(Doc. 126, Ex. 34). This representation indicates that DMA had notice of the Modified Plan and the September 30 meeting. Indeed, the California Bankruptcy Court appointed the Creditors Committee to act on behalf of DMA, and DMA is bound by any decisions that the Committee made. If the Committee elected not to file a claim, DMA cannot now collaterally attack that decision by suing GM and the other Defendants.

In addition, DMA President Hong testified that DMA did not instruct anyone to attend the September 30 creditors' meeting on its behalf. Further, DMA did not oppose or approve the Modified Plan, and Hong did not tell its appointee to do one thing or the other with regard to the Modified Plan. (*See* Hong Depo. at 126 and 129). Apparently, DMA relied on the assumption that the automatic stay imposed by the filing of its own bankruptcy would trump all further proceedings in the Korean Court.

2. Reciprocity

In determining whether to grant comity, one permissible factor, though not an absolute prerequisite, is whether the foreign court recognizes U.S. judgments. *Remington*, 830 F.2d at 1273 ("Although reciprocity is no longer an absolute condition precedent to comity, it is always a permissible consideration, and here we believe it to be a consideration of extreme importance."); *Her Majesty Queen in Right of Province of Brit. Columbia v. Gilbertson*, 597 F.2d 1161, 1163-64 (9th Cir. 1979)[40] ("Before comity may be extended, generally there is a requirement of reciprocity, which is the principle that the courts of one jurisdiction will recognize a judgment from a second jurisdiction only if the courts of the second jurisdiction would recognize a judgment from the first jurisdiction's courts."); *International Trans.*, 347 F.3d at 597 (Smith, J., dissenting) ("The test [under the *Hilton* case for comity] encourages respect for foreign courts (in hope of reciprocal respect), discourages protracted re-litigation of the same dispute, and ensures procedural fairness for the aggrieved party."); *Corporacion Salvadorena de Calzado v. Injection Footwear Corp.*, 533 F. Supp. 290, 299 (S.D. Fla. 1982) (accepting and adopting Special Master's recommendation that judgment rendered in El Salvador should be denied comity based on the reciprocity rule – "if the rendering state . . . would refuse to recognize a judgment of the State of Florida because of a particular defect, then Florida would refuse to recognize a like judgment rendered by [that state].") (internal citations omitted).

In *Remington*, as here, the court found compelling the fact that Dutch law did not recognize as binding orders of foreign courts. 830 F.2d at 1268. Similarly, the CRA of Korea adopts a

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[40] The Ninth Circuit recognized that the reciprocity requirement "has fallen into some disfavor." *Her Majesty*, 597 F.2d at 1164 n. 6.

territorial approach and does not defer to U.S. bankruptcy law.[41] This lack of reciprocity gives this Court pause. However, reciprocity is but one factor to weigh, *Remington*, 830 F.2d at 1273, and when weighed against the other factors, it does not win the day.[42]

3. Comity is Appropriate

After taking into account all the foregoing considerations, the Court concludes that granting comity is proper. Korea has significant interest in regulating business activity on its shores, *Overseas Inns*, 911 F.2d at 1149 (noting that U.S. courts consistently recognize foreign courts' interest in winding up the affairs of their domestic business entities), and any differences between Korean and U.S. bankruptcy law are minimal and do not offend U.S. notions of due process.[43] Moreover, DMA had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process. *Allstate*, 994 F.2d at 1000 (granting comity to Australian court because plaintiff had full notice, attended all meetings and hearings, were represented

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[41] CRA Article 4.2 provides: "Reorganization proceedings commenced in a foreign country shall not have any effect on property in the territory of the Republic of Korea." (Doc. 126, Ex. 33B).

[42] In this case, unlike *Remington*, a friendship treaty exists between Korea and the United States. *See Choi v. Kim*, 50 F.3d 244 (3d Cir. 1995) (acknowledging Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217, which "elevates a Korean judgment to the status of a sister state judgment."). While the existence of a Friendship Treaty is not dispositive, *id.* at 250 (holding, ultimately, that the Korean procedures executed pursuant to the Code of Civil Procedure did not comport with U.S. notions of due process) it certainly is a relevant consideration.

[43] DWMC was a substantial corporate citizen of Korea, employing thousands of people and involving numerous creditors.

on relevant committees, and filed two actions in the Australian courts). If DMA objected[44] to the relevant transactions[45] and orders, it should have done so before the Korean tribunal.[46] *International Trans.*, 347 F.3d at 594 (creditors of an insolvent foreign corporation may be required to assert their claims before a duly convened foreign bankruptcy tribunal to preserve claims against a foreign bankrupt); *In re Int'l Nutronics, Inc.*, 28 F.3d 965, 969 (9th Cir. 1994) (in res judicata context, a party is barred from seeking relief on grounds that could have been asserted in a prior suit between the same parties on the same cause of action). The fact that DMA now seeks to hold GMDAT liable as the successor of DWMC highlights DMA's true intention – to collaterally attack the entire Korean reorganization process and result. This Court will not permit such an improper collateral attack to undo the Korean Court's

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[44] There is evidence that DMA harbored grave concerns about a "potential breach" of the Distribution Agreement and knew of GM's potential decision to exclude DMA's U.S. operations from the GM-DWMC agreements. In fact, DMA management wrote to GM to express its concerns on March 27, 2002. (*See* Doc. 124, Ex. 21).

[45] It is worth noting that DMA ultimately stands to benefit from these transactions.

[46] Again, this Court's ruling mirrors Judge Bluebond's "Tentative Ruling:"

> If the debtor believed that the sale of a portion of the Korean parent's manufacturing facilities to GMDAT would result in a breach of an enforceable contract with the debtor, the debtor could and should have raised that issue at the time of sale in Korea . . . whether the debtor objected to the sale and had its objection overruled or whether the debtor could have objected to the sale and choose not to do so, the result should be the same. It is too late for the debtor to argue that the sale or transfer of these facilities violated its contract rights.

(Doc. 126, Ex. 36).

efforts regarding the MTA and Modified Reorganization Plan. Instead, the Court will grant comity to the Korean Court proceedings and orders and thereby help to preserve an orderly and systematic distribution of assets.

IV. Conclusion

For all the foregoing reasons, Defendants' Motions to Dismiss (Docs. 73 and 136) are **GRANTED**.

DONE and **ORDERED** in Chambers, Orlando, Florida this 26th day of August, 2004.

/s/ Gregory Presnell

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Party

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN RE Daewoo Motor Co. Ltd.,
Dealership Litigation
MDL-1510
6:04-cv-201-Orl-31KRS

DAEWOO MOTOR AMERICA, INC.,
A Delaware corporation,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
SUZUKI MOTOR CORPORATION,
a Japanese corporation,
AMERICAN SUZUKI MOTOR CORPORATION,
a California corporation, and
GM DAEWOO AUTO TECHNOLOGY CO.,
a South Korean corporation

Defendants.

ORDER

Upon consideration of Plaintiff's Motion for Clarification/Reconsideration (Doc. 166) and Defendants' Responses thereto (Docs. 167 and 170); and after careful consideration of the briefs and additional documents filed by Plaintiff (Doc. 163), the Court sees no basis to reconsider its prior Order. To the Extent clarification is sought, it was this

Court's intent to dismiss all of Plaintiff's claims against Defendants based on the principle of comity. Accordingly, it is

ORDERED that Plaintiff's Motion is DENIED. The Clerk is directed to enter judgment for Defendants.

DONE and **ORDERED** in Chambers, Orlando, Florida this 7th day of October, 2004.

/s/ Gregory Presnell

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

APPENDIX D

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 03 2006
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15878-II

DAEWOO MOTOR AMERICA, INC.,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia [sic]*

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* The typographical error as to the district court from which this case is appealed appears in the Eleventh Circuit's original opinion. The appeal is actually from the United States District Court for the Middle District of Florida.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, PRYOR and ALARCÓN,* Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor
UNITED STATES CIRCUIT JUDGE

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.